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REPORTS

J. C. Thompson
OF

CASES ARGUED AND DETERMINED

IN THE

515

SUPREME COURT OF ALABAMA,

DURING

January and June Terms, 1860.

BY JOHN W. SHEPHERD,

STATE REPORTER.

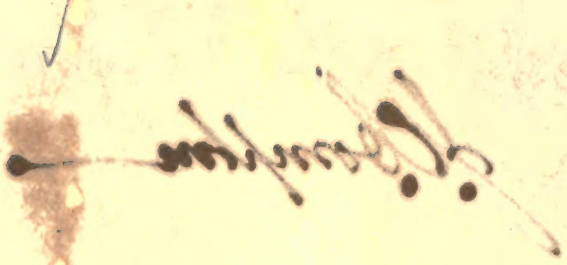
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VOL. XXXVI.

MONTGOMERY:

MONTGOMERY ADVERTISER BOOK AND JOB OFFICE.

1861.



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OFFICERS OF THE SUPREME COURT,

DURING THE TIME OF THESE DECISIONS.

HON. A. J. WALKER, CHIEF JUSTICE.

HON. GEO. W. STONE, } ASSOCIATE JUSTICES.
HON. R. W. WALKER, }

M. A. BALDWIN, ATTORNEY GENERAL.

JOHN D. PHELAN, CLERK.

JAMES S. ALBRIGHT, MARSHAL.



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ERRATA.

In *Jones v. Fort*, (p. 449,) the 6th and 8th head-notes are erroneous, but are corrected in the index, (pp. 744-5,) tit. BAILMENT.

In *Bobe's Heirs v. Stickney*, (p. 495, par. 6,) the cases of *P. M. General v. Furbee*, and *United States v. Wardwell*, should be cited as from 4th and 5th *Mason*, instead of 4th and 5th *Mass*.

REPORTS
OF
CASES ARGUED AND DETERMINED
AT JANUARY TERM, 1860.

WILLIAMS & SMART *vs.* CARPENTER & CO.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Payment; remittance of money by mail.*—To absolve a debtor from the hazard of loss, in the transmission of money by mail to his creditor, it is necessary that the remittance should be made by the authority of the creditor, and in the manner and with the precautions prescribed by him; and this principle is not affected by the impossibility of a compliance, on the part of the debtor, with the conditions and directions prescribed by the creditor.
2. *Error without injury in charge to jury.*—The correctness of a charge to the jury, which, however erroneous, could not have prejudiced the appellant, will not be revised, at his instance, by the appellate court.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. S. D. HALE.

THIS action was brought by Geo. W. Carpenter & Co., a mercantile firm in Philadelphia, against S. C. Williams and John Smart, and was founded on the defendants' promissory note for \$530 76, dated the 1st August, 1854, and payable on the 19th April, 1855, with interest from the 19th October, 1854. No pleas appear in the record. On the trial, as the bill of exceptions shows, after the

plaintiffs had read in evidence the note on which the suit was founded, on which were endorsed several payments, leaving a balance of about \$200 still due and unpaid; "the defendants offered evidence to show that, on the 12th April, 1855, they mailed a letter containing \$200 in bank-bills, at Oxford, in Benton county, (the place of their residence,) addressed to the plaintiffs at Philadelphia, and that one of them was at that time the postmaster at Oxford;" and then read in evidence, after proving their execution, two letters which they had received from the plaintiffs, dated respectively the 3d March and the 2d April, 1855.

The following extract contains the material portions of the first of these letters: "Your esteemed favor of the 24th ult. came duly to hand, and has received our most especial attention. In answer to your inquiries, we would reply that you can send us money at our risk, in sums of one and two hundred dollars at a time, by taking the postmaster's receipt, and paying letter registered under the new post-office regulations. We have now been in business near thirty years, and are constantly, and have been during all that time, receiving money by mail, and have never yet lost a dollar. We hope, therefore, that you will commence immediately to remit to us, in these sums, so that your note will be paid by the time it falls due in April."

The second letter was in these words: "Your esteemed favor of the 29th ult. came duly to hand, enclosing one hundred dollars, which we have placed to your credit, and for which please accept our thanks. We hope you will favor us with the balance due shortly, and that we shall also receive your further orders, which will at all times meet our most prompt and especial attention."

The defendants then read in evidence the act of congress of March 3d, 1855, entitled "An act further to amend the act entitled 'an act to reduce and modify the rates of postage in the United States, and for other purposes,' passed on the 3d March, 1851," the 3d section of which act is as follows: "SEC. 3. *Be it further enacted*, That for the greater security of valuable letters posted for trans-

mission in the mails of the United States, the postmaster-general be, and hereby is, authorized to establish a uniform plan for the registration of such letters, on application of parties posting the same, and to require the pre-payment of the postage, as well as a registration fee of five cents on every such letter or packet, to be accounted for by postmasters receiving the same in such manner as the postmaster-general shall direct: *Provided, however,* That such registration shall not be compulsory, and it shall not render the post-office department or its revenue liable for the loss of such letters or packets, or the contents thereof."—United States Statutes at Large, vol. 10, pp. 641–42.

The defendants offered to read in evidence, in connection with this act of congress, a printed circular, signed by the postmaster-general, and dated the 15th May, 1855, which was proved to have been sent by the post-office department at Washington to the post-office at Oxford, and which contained instructions relative to the proper construction to be placed on the said act, but gave no directions as to the registration of valuable letters. The court excluded this evidence, on the plaintiffs' objections, both when offered separately, and when offered in connection with proof of the fact that a similar circular had been received about the same time by the postmaster at Jacksonville; and to its exclusion the defendants excepted. The defendants then offered to prove by the deputy postmaster at Oxford, and by the postmaster at Jacksonville, "that under the law of March 3, 1855, no letters could be registered in either of said offices on the 1st July, 1855; and that no letters were in fact registered in either of said offices on said 1st July, 1855." The court excluded each portion of this evidence, on the plaintiffs' objections, and the defendants excepted.

"This being all the proof, the court charged the jury, (among other things,) that under the law of the United States of March 3d, 1855, a letter could be registered at Oxford on the 14th April, 1855; to which charge also the defendants excepted," and which, with the rulings of the court on the evidence, they now assign as error.

ALEX. & JNO. WHITE, for appellants.

JAS. B. MARTIN, *contra*.

A. J. WALKER, C. J.—To absolve a debtor, who transmits money by mail to his creditor for the payment of his debt, from the hazard of loss in the transmission, it is necessary that the remittance should be made by the authority, express or implied, of the creditor, and in the manner and with the precautions prescribed by him.—Smith's Mercantile Law, 528-529; Warwicke v. Noakes, Peake's R. 67; Hawkins v. Rutt, *ib.* 186; Townsend, Crane & Co. v. Henry, 9 Rich. Law, 318; 3 Phillipps on Ev. 440-441, note 11, (last ed.); 2 Greenleaf on Ev. 429, § 525. If it is impossible for the debtor to transmit the money in the manner and under the precautionary attendant circumstances directed by the creditor, he can not make the remittance at the risk of the creditor. His authority is to remit in the manner and under the circumstances prescribed, and if he remits without pursuing the directions, he acts without authority. Like an agent, he must pursue his authority, and strictly observe its limitations and qualifications. Story on Agency, 213, § 165.

From an application of the principle above stated to this case, it must result that, if the plaintiffs only authorized the remittance to be made under certain specified precautionary observances, the defendants would not be justified in making the remittance without them, because they could not be performed.

The plaintiffs' letter of 3d March, 1855, authorizes the defendants to transmit the money by mail, at their risk, in sums of one and two hundred dollars at a time, taking the postmaster's receipt, prepaying the postage, and registering the letter under the new post-office regulations. The plaintiffs' subsequent letter of April 2d, 1855, acknowledges the receipt of a letter enclosing one hundred dollars, and expresses the hope of being shortly favored with the balance. This letter does not modify the instructions of March 3d, 1855, nor do we think that a modification of such instructions can be implied from it. It does not, in terms, authorize a remittance by mail, but

seems simply to pass it silently by as a matter previously settled.

The question, after the ascertainment of the fact that the money had been mailed, was, whether it was mailed under the precautionary circumstances directed. If it was not, the mailing of the money was at the defendants' risk, and it is totally immaterial whether the defendants could or could not have pursued the instructions given. If they could not have pursued them, they were without authority from the plaintiffs to transmit the money by mail. The evidence offered as to the instructions of the postmaster-general, and as to the impossibility of registering letters, pertained to a totally immaterial matter, and was inadmissible on account of irrelevancy.

[2.] The charge given could not possibly have prejudiced the defendants. If it had been the reverse of what it is, it would not have benefited them. Looking at the evidence, it is perfectly clear that, if erroneous, the charge has not prejudiced the defendants; and we would not, therefore, reverse, if upon examination we found it incorrect.—*Salmons v. Roulmtree*, 24 Ala. 458; *Shepherd's Digest*, 568-569.

Judgment affirmed.

WATSON vs. TOOL & NICHOLSON.

[TRESPASS AGAINST SHERIFF FOR ILLEGAL LEVY OF ATTACHMENT.]

1. *Irrelevant evidence in rebuttal.*—The admission of irrelevant evidence, in rebuttal of irrelevant evidence, is, at most, error without injury.
2. *Relevancy of evidence rebutting fraud in execution of conveyance.*—In trespass against a sheriff, for levying an attachment on a stock of goods claimed by the plaintiffs under a conveyance from the defendant in attachment, which conveyance is impeached for fraud by the defendant; the defendant having proved that, about the time of

the execution of the conveyance for the stock of goods, the debtor also conveyed all his other property to the plaintiffs, taking their notes for the purchase-money, and having adduced other evidence of fraud in the execution of the conveyances, it is competent for the plaintiffs, in rebuttal, to prove that the proceeds of these notes were used by him in payment of pre-existing *bona-fide* debts, and that the plaintiffs had paid the debts which, by their contract with him, they had bound themselves to pay; and the fact that these payments were made after the levy of the attachment, and after the institution of the suit, does not affect the admissibility of the evidence.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Alfred Tool and Charles Nicholson, merchants and partners in trade, doing business under the firm name of Tool & Nicholson, against Clement L. Watson, to recover damages for the defendant's tortious act, as sheriff, in levying an attachment against William Nicholson, on a stock of goods which the plaintiffs claimed, but which had formerly belonged to W. & C. Nicholson, a mercantile firm composed of said William and Charles Nicholson. The plaintiffs derived title under a conveyance, dated the 28th June, 1856, by which William Nicholson transferred his interest in the stock of goods to said Tool; which conveyance the defendant sought to impeach on the ground of fraud. The only plea was the general issue, "with leave to give in evidence any matter that might have been specially pleaded."

On the trial, as appears from the bill of exceptions, the plaintiffs introduced as a witness one William L. Mitchell, who, on his direct examination, testified, that he had been the clerk of the late firm of W. & C. Nicholson, and in the latter part of June, 1856, had taken an inventory of their stock of goods, notes and accounts; that this was done at the request of said partners and of Alfred Tool, and was completed prior to the 28th June; that on the 28th June, after the inventory had been made out, William Nicholson and Tool agreed upon the terms of a contract, by which, the former sold and transferred to the

latter his entire interest in all the partnership effects, and mutually promised to meet at the house of Charles Nicholson on the morning of the 30th June, (which was Monday,) when and where witness was to meet them and write the conveyance; that he saw Tool behind the counter on the evening of the same day transacting business, and also saw a notice posted on the door of the store-house; stating that the firm of W. & C. Nicholson had been dissolved, that William Nicholson had sold out his interest to Tool, and that the business would be in future conducted under the firm name of Tool & Nicholson; that the parties all met at the house of Charles Nicholson on the Monday morning following, at which time and place the conveyance was written by witness, and executed by the parties; and that he dated the conveyance on the 28th instead of the 30th June, not by the direction of the parties, but because the terms of the contract were settled on that day. The conveyance referred to, which was signed by said Mitchell, and two other persons as attesting witnesses, and was attached to the bill of exceptions as an exhibit, is as follows:

“I this day sell and transfer unto Alfred Tool all my interest or property to the store of W. & C. Nicholson, together with all books, notes and accounts which I have, jointly with Charles Nicholson, or individually, upon his paying the following notes and accounts: one-half of the indebtedness of W. & C. Nicholson, amounting to ten or twelve thousand dollars, the larger portion of which is due in New York on the first of next year; pay note to J. M. Dansby, for nine hundred and twenty dollars, and note to Boswell Turner, (on both of which he is security,) Dade, Huxthal & Co. sixteen hundred and sixty-four dollars, balance of note due Ann W. Vance, and two notes due Allen Yates, for about fifteen hundred dollars; and the said Alfred Tool agrees to exonerate me from all liability on the above named notes; and I hereby sell and deliver unto him the above named interest in all books, papers, notes, accounts and store. Given under my hand and seal, this the 28th day of June, A. D. 1856.

WM. NICHOLSON, [L. S.]”

"The plaintiffs then proposed to show that the debts mentioned in said conveyance had been paid by them. The defendant objected to this evidence; his objection was overruled, and he excepted. The witness was then asked, if the New York creditors mentioned in said conveyance had been paid; and replied, that said creditors had made him their agent in regard to said claims, and had forwarded them to him, with full power and authority to accept in full settlement of them the notes of the new firm of Tool & Nicholson; that he, as the agent of said creditors, in the latter part of July, 1856, took from said Tool & Nicholson, in full settlement of the notes held by said creditors, new notes payable on the 1st January, 1857, and enclosed them to said creditors; and that all of said notes had since been paid by Tool & Nicholson, except a part of one of them, to pay which the sheriff had that day sold Tool's property. The defendant objected to the testimony of said witness in reference to the payment of said New York creditors and the manner of it, on the ground that it relates to transactions subsequent to the sale of William Nicholson's interest in said stock of goods to Tool, and subsequent to the bringing of this suit, and was irrelevant; but the court overruled the objection, and admitted the evidence; to which the defendant excepted.

"Said Mitchell testified, on cross examination, that the goods purchased in New York, embraced in the sale by William Nicholson to Tool, cost \$9,300; that the old stock of goods on hand was valued in the trade at \$4,000; that the old debts due to said W. & C. Nicholson amounted to \$2,050; the accounts due for sale of goods from the 1st to the 28th June, 1856, to \$5,773, and the notes and accounts due to William Nicholson to \$2,428;" that no note or writing of any kind was signed by Tool at the time the conveyance from William Nicholson was executed; that the parties all went back to the store immediately after the execution of the conveyance, and there found the deputy sheriff, who said that he had come to levy an attachment on William Nicholson's property; that Tool then exhibited the conveyance from William

Nicholson, and claimed the stock of goods as belonging to himself and Charles Nicholson; and that the deputy sheriff thereupon levied the attachment on a carriage, some horses, and other articles of inconsiderable value, but made no levy on the stock of goods, and returned to his principal for instructions. The court allowed the defendant to further prove, on cross examination of the witness, against the plaintiffs' objection, that on the 1st July, 1856, William Nicholson conveyed to Tool the tract of land on which he resided, which contained about eight hundred and twenty acres, and was worth about seven dollars per acre; that the consideration expressed in the deed was \$10,000; that on the same day said Nicholson also sold to Tool a negro girl named Viney, at the price of \$900, (for which Tool gave his note,) and his entire stock of cattle, furniture, &c., to Tool and Charles Nicholson. The bill of sale for the cattle and furniture, which was produced by the witness, recited a consideration of \$900, and conveyed all the grantor's household and kitchen furniture, "except that which is allowed me [him] by law." The witness further testified, that these conveyances embraced all the property of which William Nicholson was then possessed, except that on which the deputy sheriff had levied an attachment as above stated; that William Nicholson was at that time very much embarrassed, if not insolvent; that he and his family continued to reside, as before, on the tract of land conveyed to Tool, and remained in possession of the furniture; that the girl Viney went into Tool's possession after the sale, but subsequently returned to the residence of said Nicholson, and continued to wait on his family as a house-servant, until the spring of 1857, when she was sold by Tool, in the presence of said Nicholson, to one Lang; that Tool was worth about \$5,000 at the time of these transactions, and was engaged with witness in the business of tanning; that Charles Nicholson was then worth about \$10,000, but his wife also owned a considerable estate, and he made from eighty to one hundred bales of cotton annually.

"Said witness was asked by plaintiffs, on his rebutting

examination, if he knew what William Nicholson did with the note given him by Tool for the girl Viney; and answered, that said note was transferred by William Nicholson, in the winter of 1856-7, to one of his creditors named Lang, and was afterwards paid by Tool by the sale of Viney to said Lang. To this question and answer, each, the defendant objected, on the ground that the same was irrelevant, and was *res inter alios acta*, and that it was not competent for the parties, by their subsequent acts, to make valid their previous transactions which were void as against attaching creditors; and, on these grounds, moved the court to exclude said testimony from the jury. The court overruled the objections, and refused to exclude the evidence from the jury; and the defendant excepted. The plaintiffs also asked said witness, what William Nicholson did with the notes and drafts which he received from Tool and Charles Nicholson, for said land, cattle, furniture, &c., above mentioned; and in reply, testified to several payments made by said William, by means of said notes and drafts, to some of his creditors, in the latter part of the year 1856, and in the beginning of the year 1857. To this question and answer, each, the defendant also objected, for the reasons aforesaid, and excepted to the overruling of his objections."

William Nicholson, the defendant in attachment, was afterwards introduced as a witness, and was permitted to testify, against the defendant's objections, to payments made by him in 1856-7, with the proceeds of the notes received by him from Tool and Charles Nicholson, on *bona-fide* debts, for which Charles Nicholson was also liable, either as partner with William or endorser for him; and to the admission of this evidence an exception was reserved by the defendant.

The rulings of the court on the evidence, to which, as above stated, exceptions were reserved by the defendant, are the only matters assigned as error in this court.

A. R. MANNING, for appellant.—The effect of the rulings of the court below, in admitting the evidence to which the appellant objected, is to enable parties who are

charged with an act fraudulent towards creditors, after their transactions have been assailed as fraudulent, to manufacture evidence in their own behalf, to be used in a suit already instituted. Such subsequent acts belong to the same class of evidence as subsequent declarations of a party, and are so treated in the text-books. "It is a most general and extensive rule, that all a man's acts and declarations shall be admitted in evidence, whenever they afford any presumptions against him," because such acts and conduct frequently afford presumptions as strong as express declarations.—Starkie on Evidence, vol. 2, p. 29. In such a case as this, a man would not be permitted to offer his own subsequent declarations in evidence, in order to maintain a suit in his favor, or to defend a suit against him; nor should be permitted to prove his subsequent acts for a like purpose. "If such proof were allowed, there would be no end to the expedients to which men would resort to fabricate testimony, so as to meet the various exigencies of their defense."—Falkner v. Leith & Jones, 15 Ala. 10; also, 1 Phil. Ev. (C. & H. Notes,) 774–76. "On the question of fraud in a conveyance of personal property, evidence that the vendee afterwards conveyed a portion of it, with other property, to a creditor of the vendor, as a security for the debt, (the vendee also being liable therefor as surety,) is inadmissible to rebut the evidence of fraud."—Kimball v. Thompson, 4 Cushing, 441. All the transactions proved were *res inter alios acta*, and, on that account, ought to have been rejected.—1 Phil. Ev. (C. & H. Notes,) 748.

WM. BOYLES, *contra*.—1. The contract of sale was authorized by law.—14 Ala. 263; 18 Ala. 316; 2 Chitty's Pl. 4. If Tool was bound in law to pay the debts which he assumed to pay at the time of the sale and delivery of the goods, then the sale had the same validity as if the money had been paid at the time. It is a settled rule of law, that if A. promise B. to pay a sum of money to a third person, and this promise is founded upon a sufficient consideration, such third person may maintain an action on the promise.—8 Porter, 333; 14 Ala. 265; Peters' C. C.

169; 5 Blackf. 179. The creditors accepted Tool's promise, and he paid the debt.—17 Ala. 687.

2. If the contract of sale was authorized by law, the payment of the consideration could be shown, especially where fraud is relied on as a defense.—5 Stew. & P. 410; 12 Ala. 24; 15 Ala. 13. The amount of the consideration is not important, nor is it necessary that it should appear on the face of the contract, as it may be proved *aliunde*.—24 Vermont, 189.

3. The court did not err in permitting the plaintiffs to prove the *bona fides* of the sales made after the consummation of the sale in controversy. The evidence of these sales was brought out by the defendant, against the plaintiffs' objection. Where a part of a transaction has been elicited from a witness on his direct examination, the opposite party has a right to inquire into all the facts and circumstances connected with it, although they might not be admissible as independent testimony.—18 Ala. 625; 24 Ala. 9; 22 Ala. 476; 21 Ala. 797; 17 Ala. 55.

STONE, J.—All the questions presented by the record in this case, arise on the admissibility of rebutting evidence. They are all of kindred character. Each piece of evidence which was admitted against the objection of defendant, tends to prove some act done after the attachment was levied, and after this suit had been instituted. The questions may, then, in the main, be considered together.

The attachment was issued against the effects of W. Nicholson. It was levied on property belonging, as it is asserted, to Tool and C. Nicholson. The whole controversy in the circuit court hinged on the inquiry, had W. Nicholson sold the effects levied on, to the plaintiffs, before the attachment was levied? and was that sale *bona fide*, or fraudulent? This inquiry necessarily opened a wide field for exploration.

For the defendant, it was competent to prove every fact and circumstance which tended to show that the transaction was not in good faith, or was in secret trust for the benefit of W. Nicholson, the grantor. In this connection,

we cannot say that the circuit court permitted the examination by defendant to take too wide a range. The insolvency of W. Nicholson—the property and means of Tool and C. Nicholson—the haste attending the consummation of the contracts—the fact that, reserving only the property which the law exempted to him as the head of a family, W. Nicholson sold and parted with every piece and parcel of property which he owned, including lands, houses, slaves, carriages, house-servants and house-furniture, and retained the possession of much of it, as he had theretofore done; and all this during a few consecutive days, and when the sheriff was levying upon portions of his property under attachments—these necessarily furnished grounds for argument against the validity of the transfer; grounds from which, if unexplained, a jury might be urged to infer that there was a secret trust. They all tended, by cotemporaneous conduct, to shed light on the transaction which was directly in issue.

But we need not inquire whether each of these several transactions was legal evidence for defendant. The court admitted them; and under a well settled rule of this court, if illegal evidence be given in against a party, he will be permitted to rebut that evidence.—*Nelson v. Iverson*, 24 Ala. 9; and see authorities on the brief of counsel.

[2.] We think the rebutting evidence introduced by plaintiffs, and objected to by defendant, was, in each instance, admissible. It tended proximately to prove two propositions, either of which justified its reception: first, that Tool and C. Nicholson possessed the requisite means to purchase and pay for the goods; and, secondly, it tended to rebut the imputation that there was a secret trust for the benefit of W. Nicholson. The fact that these transactions occurred *post litem motam*, weakened their influence for the latter purpose; but this was the proper subject of a charge. We have, on this record, to deal only with the relevancy of the evidence. Its sufficiency and effect are not presented for our consideration.—*Pennington v. Woodall*, 17 Ala. 687; *McCaskle v. Amarine*, 12 Ala. 17, 24; *Lanier v. Br. Bank*, 18 Ala. 625.

Judgment affirmed.

WILLIAMS vs. McCONICO.

[DETINUE FOR SLAVES.]

1. *Construction of deed of gift to grantor's daughter and the heirs of her body.*—Under a deed of gift, by which the grantor, after reciting his wish to make permanent provision for an unmarried daughter and her children, conveyed certain slaves to a trustee, “for the sole use of my [his] said daughter Prudence and the heirs of her body forever; but, in case the said Prudence shall die without an heir, then the said negroes, together with their increase, to return to my estate, to be equally divided between her brothers and sisters,”—*held*, that the interest of the daughter, whatever it might be, terminated at her death, and that the children then took the absolute property as remainder-men.
2. *Continuance of trustee's title.*—Where slaves are conveyed by deed to a trustee, “or his legal representative,” for the sole use and benefit of the grantor's unmarried daughter and her children, forever, the legal title of the trustee does not cease at the death of the daughter, leaving children; and if the original trustee resigns, and another person is appointed in his stead by the circuit court, the death of the substituted trustee does not invest the children with the legal title.
3. *Admissibility of record as evidence.*—In detinue for slaves, by persons claiming as remainder-men under a deed of gift, against the representative of the husband of the first taker, a transcript from the records of the circuit court of the county in which the deed was recorded, showing the resignation of the trustee appointed by the deed, with the consent of the grantor and beneficiary, and the appointment of another trustee in his stead, is not admissible evidence for the plaintiffs, in connection with the proof of the death of the substituted trustee, to show that there is no legal title outstanding against them, when the identity of the names of the parties is the only evidence connecting the record with the slaves and deed in controversy, and it appears that the death of the trustee did not invest the plaintiffs with the legal title to the slaves.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. PORTER KING.

THIS action was brought by the appellants, who were the children of James O. and Prudence Williams, both

deceased, against Christopher S. McConico, to recover certain slaves, which the plaintiffs claimed under a deed of gift from their maternal grandfather, William Thompson, and of which the defendant held possession as the administrator of said James O. Williams. The plaintiffs read in evidence on the trial, without objection from the defendant, a certified copy of the deed of gift from said Thompson, which was in the following words:

“State of Alabama, } Know all men, by these pres-
 Morgan county. } ents, that I, William Thompson,
 of the county and State aforesaid, for and in consideration of the love and affection I have and bear towards my daughter, *Prudence Richard Thompson*, and wishing to make permanent support for her and her children, I do hereby give and grant unto my son, Robert A. Thompson, or his legal representative, in trust, and for the sole use and benefit of my said daughter, *Prudence Richardson*, and the heirs of her body forever, the following negroes, to-wit:” (specifying them by name,) “together with their increase; to have and to hold the said negroes to the said Robert A. Thompson, trustee as aforesaid, or his legal representative, for the sole use and benefit of my said daughter, *Prudence Richardson*, and the heirs of her body forever; but, in case the said Prudence shall die without an heir, the said negroes, together with their increase, to return to my estate, to be equally divided between her brothers and sisters. In testimony whereof, we have hereunto set our hands and seals, this 22d day of April, 1830.”

“WILLIAM THOMPSON, [Seal.]”

“Ro. A. THOMPSON, [Seal.]”

The bill of exceptions states, that “the following proof was also made: That said deed was duly acknowledged, probated, and admitted to record, in Morgan county, on the day of its date; that said Prudence subsequently married James O. Williams, who died, intestate, before the bringing of this suit; that the plaintiffs are the issue of said marriage, all of whom are minors and sole heirs of said Prudence, who died before her said husband; that some of the slaves sued for are a portion of those men

tioned in said deed, and the others are their increase, since born; that the said William Thompson had the possession and ownership of said slaves at the time of the grant, and the defendant was in possession of those sued for at the time the suit was brought; that Robert A. Thompson, the said trustee, controlled the property, from the time of the conveyance, until the marriage between said Prudence and James O. Williams."

"The value of said slaves, and of their respective hires, was also proved; and it was further proved, on the part of the defendant, that he had been duly appointed and qualified as administrator of said James O. Williams, deceased, and was still acting under said appointment, which was unrevoked and of force; and that his said intestate died in possession of said slaves."

During the progress of the trial, the plaintiffs offered to read in evidence a transcript, duly certified, from the records of the circuit court of Morgan county, containing an entry, made on the 11th March, 1839, in the following words:

"<i>Ec parte</i> Robert A. Thompson, trustee.	}	Whereas, upon the application of Robert A. Thompson, who has been heretofore created trustee, by deed of record in the office of the county court of Morgan county, executed by William Thompson, conveying for the uses and trusts therein specified certain negroes; and the said William Thompson, Prudence Williams, late Prudence Thompson, who was the <i>cestui que use</i> in said deed, and James O. Williams, the husband of said Prudence, coming into open court, and consenting to the resignation of the said Robert A. Thompson of his said office as trustee; and it appearing to the satisfaction of the court, by the admissions of the parties, that none of the trust property had come into the hands of the said trustee; it is, therefore, ordered and decreed by the court, that the said Robert A. Thompson be released from the said office of trustee; and it is further ordered, upon the application of the said parties, and upon satisfactory evidence of his qualifications therefor, that the said James O. Williams be appointed in his stead as trustee, and to
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do and perform whatever may devolve upon him according to the provisions and powers of said deed."

"Being called on to state the object of the introduction of said record, plaintiffs' counsel said, that it was for the purpose of thereby showing an admission on the part of the said James O. Williams against any marital rights of his that might be set up against them. The court refused, on the defendant's objection, to allow the same to be read in evidence, and the plaintiffs thereupon excepted. The plaintiffs then offered to introduce said record in evidence, in order to show that the trusteeship had changed to said James O. Williams, who was dead, whereby there was no legal estate outstanding against them; but the court refused, on the defendant's objection, to allow the same to be read in evidence, and the plaintiffs thereupon excepted."

"The foregoing being all the proof in the cause, the plaintiffs requested the court to charge the jury, 'that if they believed the evidence, the plaintiffs were entitled to recover.' The court refused to give this charge, and instructed the jury, 'that the deed under which the plaintiffs claimed did not convey to them such an interest as that they could maintain this action;' also, 'that under the proof in the cause, the plaintiffs had not shown sufficient title to recover upon, and they must find for the defendant, if they believed the evidence'; to which charges, as well as to the refusal of the charge requested, the plaintiffs excepted."

The rulings of the court on the evidence, the charges given, and the refusal of the charge asked, are now assigned as error.

T. B. WETMORE, for appellants.—Whatever estate Prudence Thompson took under the deed, was a separate estate, to which the marital rights of her husband did not attach. This is shown by the appointment of a trustee, she being at the time unmarried; by the provision made for a "permanent" family support, and by the use of the words "sole use and benefit." That part of the deed which goes to the creation of the separate estate, is almost

identical with the controlling words in *Jenkins v. McConico*, 26 Ala. 214; while in the appointment of a trustee, and in the employment of the words "sole use and benefit," the case at bar is stronger than the one cited.

The estate of Prudence is for life only, with remainder to her surviving children; for the latter part of the deed shows, that, if she dies *without an heir*, the property was to be divided among her brothers and sisters. The term *heir*, as here used, means issue; because the same clause contains a provision for brothers and sisters, who, in default of issue, are heirs by law. The word is used, then, in its common, and not in its legal acceptance. Indeed, the term is always incorrect, when applied to personal property. There can be no provision for the division of property on the death of a party, when that party takes an absolute estate.

That the estate which Prudence took, whether she held in severalty, or jointly with her children, lasted no longer than her life, is shown by the fact that provision is made for the disposition of the whole property, and not of a portion of it only—"said negroes to return," &c. It is apparent, then, that she left no estate to be administered in the property, and that the entire interest is in the plaintiffs. A distribution of any portion of the property as her estate, would be inconsistent with the provisions in the last part of the gift, which make the property go directly as granted; the words "return to my estate," &c., being unnecessary, and only designed to explain the conditional gift to the brothers and sisters; and showing, at least, that no portion was to go to her estate.

Does the deed, then, vest a remainder in the children? The words "heirs of the body," denoting an estate-tail, ordinarily convey an absolute estate, when used in gifts of either real or personal property; but, when "restricted by some expression indicative of an intention that the first estate shall cease on the first taker's dying without issue at the time of his death," they do not create an estate-tail. *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. 1003. This deed contains such a provision distinctly: Upon the death of Prudence without issue, the property

was to return to the donor's estate, to be equally divided among her brothers and sisters. The intention of the testator is manifest, and contravenes no rule of law.

The purpose for which a trustee was appointed, has ceased with the death of both parents. There is now nothing for the trustee to do, and no occasion for the exercise of any power. The conveyance is to him and his personal representative—not his heirs—and contemplates the existence of the trust for a very limited time; and, on the happening of a certain event, there is a provision for the distribution of the property; in both of which particulars the case differs from that of *Bryan v. Weems*, 29 Ala. 423. But, even if a different construction should prevail as to the estate of the trustee under the deed, the court erred in rejecting the evidence of the resignation of that trustee, and the substitution of a new one, whose estate terminated with his life. It is submitted that, where a court appoints a trustee, his estate never lasts longer than his life. The act of 1829, (*Aikin's Digest*, 427,) under which Williams was appointed trustee by the court, does not authorize the continuance of the trusteeship longer than the life of the trustee; the condition of the estate, and of the parties, does not require its further continuance; and the deed contains no provision which now calls for it. On this point, see *Code*, §1323; 19 Ala. 747; 3 *Sneed*, 231.

If these views are correct, the record which was excluded should have gone to the jury, and they should have been left to decide whether it referred to the slaves here in controversy. The grantor, the trustee and the beneficiary, as described in the transcript, are the same as in the deed; the species of property in each is the same, and the county in which the deed purports to have been recorded.

The appellants insist, in brief, that they are remaindermen under the deed, and that there is no trust estate intervening to defeat their action.

S. F. HALE, *contra*.—The deed conveys either an absolute estate to Prudence Thompson, subject to be defeated by her death without issue, or an estate-tail, which con-

sequently gives an absolute estate; and in either event the plaintiffs cannot recover.—14 B. Monroe, 322; 24 Ala. 315; 15 Ala. 373; 18 Ala. 400; 26 Ala. 593, 676; 9 Leigh, 253. The words “wishing to make a permanent support for her and her children,” in the introductory part of the deed, cannot control the granting clause.—Webb v. Webb, 28 Ala. 588; Denson v. Mitchell, 26 Ala. 360.

R. W. WALKER, J.—The donor employs three different expressions, (all having different significations, if technically understood,) to designate the same persons—to-wit, at one place “*children*,” at others, “*heirs of the body*,” and at still another, “*an heir*.” This circumstance very clearly indicates, that the instrument was prepared by a person not familiar with the precise meaning of the technical phrases employed; and in construing it, much greater latitude is allowable, than would be indulged in the construction of a deed bearing upon its face evidence of having been drawn by one who was accurate in the use, and acquainted with the legal effect, of the particular expressions to be found in it.—22 Ala. 438; 20 Ala. 710. We think that the words “*heirs of the body*,” and “*heir*,” as employed in this deed, are so explained by the context, as to show that they were used as synonymous with children.—Robertson & Pettibone v. Johnston, in MS.

The rule of construction commonly known as the rule in “*Wild’s case*,” is, that where lands are devised to a person and his children, and he has children at the time the will is made, and at the death of the testator, the parent and children living at the testator’s death take jointly under the will; but, where the devise is to one and his children, and he has no children at the date of the will, or at the testator’s death, the parent takes an estate-tail.—6 Coke’s R. 17; 2 Jarman on Wills, 307–8, and cases there collected; Nimmo v. Stewart, 21 Ala. 691; Furlow v. Merrill, 23 Ala. 716.

If this rule is applicable to wills of personal estate, a bequest to A. and his children, there being no children *in esse* at the time, would, as a general proposition, give to the parent the absolute interest, according to the fami-

liar doctrine that the same terms which, when employed with respect to real estate, create an estate-tail, carry, if used in a bequest of personalty, the absolute property. In the English courts, it has been occasionally questioned whether the rule in Wild's case is applicable to wills of personalty.—See *Paine v. Wagner*, 12 Sim. 188; *Stokes v. Heron*, 12 Cl. & Fin. 161; 2 Wms. Exrs. 937. But our decisions seem to settle it as the law in this State, that in this respect no distinction is to be recognized between devises and bequests; and that where property, whether real or personal, is limited to one and his children, there being no children, either when the will is made, or when it takes effect, the general rule is, that the absolute property vests in the parent.—See *Vanzant v. Morris*, 25 Ala. 292; *McCroan v. Pope*, 17 Ala. 617.

There can be no doubt, however, that in both of the cases which have been mentioned—that is to say, where there are children *in esse*, and also where there are none—slight indications in the context, of such an intention on the part of the testator, have frequently been thought sufficient to justify courts in holding, especially in bequests of personalty, that the parent shall take for life, with remainder to his children, including herein all the children that may be born before the termination of the parent's life-estate. The chief reason for such an inclination on the part of the courts, where the gift is to one and his children, there being children *in esse* at the time, is, that the other construction, resulting from the application of the first branch of the rule in Wild's case, by confining the gift to those children who are living at the testator's death, excludes entirely all those born after that event. Another reason which has been suggested is, that the children, if tenants in common with the parent, might, on arriving at age, demand a partition, and thus deprive the parent, who in these cases is frequently, if not usually, the primary object of the testator's bounty, of the means of support in old age.—*Chesnut v. Meares*, 3 Jones' Eq. 417.

Where there are no children *in esse* at the time the gift takes effect, the general rule, which vests the absolute

estate in the parent, has, in some instances, been treated as even less stubborn, and still more easily turned aside by the force of slight additional expressions in the will. Indeed, the Kentucky court of appeals has, in a recent case, and in a well considered opinion, distinctly repudiated this second branch of the rule in Wild's case; and the decision is placed upon the ground, that the law of that State having converted estates-tail into absolute *fee-simple* estates, the reason on which the rule was founded has ceased to exist; and in fact, that the very policy which caused it to be adopted, now demands its abrogation. The English rule, it is properly said by the court, was originally adopted in order to effectuate the intention of the testator. "The intent is manifest and certain that the children should take, and as immediate devisees they cannot take, because they are not in *rerum natura*; and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; and therefore such words will be taken as words of limitation."—6 Coke's R. 17 (a). That is to say, such a devise was construed to create an estate-tail, in order to render the gift to the children effectual; and under that rule, in England, the gift to the children was made effectual. But in this country, where estates-tail are converted into estates in fee-simple, the very rule which, according to the old common law, carried out the intention of the testator, by securing the benefit of the gift to the children, defeats that intention by cutting them out completely. The court held, that for these reasons, and in order to effectuate the manifest intent of the testator, a different rule of construction must be here adopted; and accordingly, a devise to a parent and his children, the parent not having any children when the devise took effect, was construed to give a life-estate to the parent, with remainder to the children, because in no other way can the devise to the children be made effectual. The same considerations would, of course, apply to bequests of personality, in which an estate-tail cannot exist.

Though the second, as well as the first branch of the old rule, has been recognized as in force in this State,

(25 Ala. 292,) and has not been abandoned in England, or, so far as we are aware, in any of the States of the Union, except Kentucky, there is no doubt that a strong disposition has been frequently shown, in this class of devises, to consider slight circumstances in the context as justifying the courts in confining the parent's interest to one for life, and giving the children the remainder; for the reason, that the construction which gives the parent the absolute property, cuts the children out completely, although they are expressly named as objects of the testator's bounty.—See what is said by Lord Hardwicke, in *Buffar v. Bradford*, 2 Atk. 220; 2 Sim. 490; 2 Jarm. 516. in both of the classes of cases alluded to, the courts incline to act upon the rule to include as many objects of the gift as possible, consistently with the declared purpose of the testator.—2 Phill. 351.

The same considerations which would justify a departure from the rule in the construction of a will, would be equally controlling in the case of a deed.—See *Chesnut v. Meares*, 3 Jones' Eq. 416.

A reference to some of the cases will illustrate and confirm what has been said, as to the inclination which some courts have shown to make this rule bend to slight indications in the context of an intention on the part of the testator to give the parent an estate for life, with remainder to the children.

In *Jeffery v. Honeywood*, (4 Madd. 398,) where a testator gave certain estates, "to A., and to all and every child and children, whether male or female, of her body lawfully issuing, and unto his, her, and their heirs or assigns forever, as tenants in common;" A. died in the life-time of the testator, leaving ten children; Sir John Leach said: "There are two gifts—one to the mother, without word of limitation superadded, and another to her children, their heirs or assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life-estate to the mother, and a remainder in fee to the children."

In *Crawford v. Trotter*, (4 Madd. 361,) a bequest of £1,000 three per cent. reduced annuities "to A. and to

her heirs, (say children,)" was held to give a life-interest to A., and the capital to her children.

In *Morse v. Morse*, (2 Sim. 485,) where a testator gave to his daughter A. and her children £5,000 for their sole use and support, £3,000 to be paid in one year after his decease, and £2,000 after the decease of his wife, and appointed A. B. trustee of those sums for his daughter and her children; it was held, that the £5,000 was in trust for the daughter for life, and, after her decease, for all her children, whether born in the testator's lifetime or after his decease.

In *Vaughan v. Marquis of Headfort*, (10 Sim. 639,) the bequest was of £40,000 "to the marquis of Headfort and his children, to be secured for their use." The marquis had six children at the death of the testatrix. Sir L. Shadwell, vice-chancellor, held, that the father took for his life, and his children after his death; "and that construction will let in any children of the marquis that may be here after born."

A testator gave to his niece E. G. the sum of £7,000, and to her heirs, for her separate use; the sum of £7,000, to be invested in consols, in the names of A. and B., who were appointed trustees of the donation, to receive the interest of the stock, and to be answerable for the stock, for the use of E. G. and her children, and to apply it in the manner most conducive to their interest; E. G. to pay her mother, during her life, the sum of £40 *per annum*. Held, that E. G. was entitled for life, with remainder to her children born at and after the death of the testator.—*Ogle v. Corthorn*, (14 L. J., N. S. 337,) cited in 4 Eq. Dig. 3099, § 13.

In *French v. French*, (11 Sim. 257,) the testator gave £5,000 to his sons, in trust for his daughter Mrs. W., so as not to be subject to the debts, &c., of her husband; and he gave the like sum to Mrs. A. "in trust as aforesaid, for the use of herself and her children." Mrs. A. had two children living at the testator's death. Held, that they did not take either as joint tenants, or tenants in common with her; but that she was entitled to the

whole income of the fund for her life, with remainder to her children.

In *Chesnut v. Meares*, (3 Jones' Eq. R. 416,) the question was upon the construction of a deed, by which Joab Meares, for a nominal pecuniary consideration, "and for the further consideration of love and affection for his wife Polly Meares, as well as for her better maintenance and support," conveyed to a trustee, in trust for his wife, certain negroes, (warranting the same to the trustee,) "for the said Polly Meares and her children which she has or may have by me; the trustee never to dispossess my said wife and my children which I have or may have by her," and to "suffer her to enjoy, together with the children, the benefit, use and profits of the negroes forever." The court held, that the mother took the whole property for life, with remainder to all her children, as a class.

In *Ponton v. McLemore*, (2 Dev. & Batt. Eq. 285,) a testator gave a legacy in trust for his daughter, "for the maintenance of her and her children," to be applied at the discretion of the trustee, no part thereof to be the subject to the debts of her husband. It was held, that there was a bequest to the sole use of the daughter for life, and after her death to her children.

For other illustrations of the leaning of the courts to limit the parent to a life-estate, and to give the children the remainder, where the gift is to one and his children, there being children at the time, see *Hannan v. Osborne*, 4 Paige, 341; *Wood v. Baron*, 1 East, 259; *Crockett v. Crockett*, 2 Phill. Ch. 555.

In *Bridges v. Wilkins*, (3 Jones' Eq. 342,) the material parts of the will were as follows: "*Item 1st.* After paying all my just debts out of cash on hand, or debts due me, I give and bequeath the balance of my property to my sisters that may be living at the time of my death, and their lawful *issues*, except the slaves. *Item 2d.* The slaves of which I am seized and possessed, I give to my mother during her natural life, and after her death to go to my sisters and their children as above mentioned; with the express condition, that no property, of which I am now possessed, or may hereafter fall heir to, shall go

to any but my sisters directly, and their progeny, and not their husbands. * * * *Item 4th.* I give and bequeath to my sisters, as before stated, my life-policy of \$5,000." The testator left six sisters surviving him, of whom only one was married. The court held, that the words "*issues*" and "*progeny*" were used in the sense of *children*, and that each of the sisters took an estate for life in the slaves and other property, with remainder to her children.

In *Heron v. Stokes*, (2 Dr. & War. 89; S. C., 4 Ir. Eq. R. 284,) it was held, that a gift by will of personal annuities, to A. and B., for themselves and their children, they not having any at the date of the will, or at the death of the testator, gives them only a life-interest. In that case, Sir Ed. Sugden suggested, that the more natural construction of a gift to one and his children, there being no children in *esse* at the time, and that which he should have adopted in the absence of authority the other way, would be, to hold it to be a gift to the parent for life, with remainder to the children. To the same effect, see the remarks of V. C. Sir L. Shadwell, 12 Sim. 188.

In *Furlow's Adm'r v. Merrill*, (23 Ala. 705,) the bequest was in these words: "I give to my daughter Cynthia Hill one negro girl, named Ann, together with all her increase, entirely for my daughter's benefit and her children." It did not appear whether or not the legatee had any children at the time the will took effect. This court, after mentioning this, said: "This latter fact, as we construe the words of the bequest, is absolutely essential to be known, in order to determine with any accuracy the estate which Cynthia Hill took in the bequest. If she was then unmarried, the bequest would, in our opinion, create a life-estate simply in Cynthia Hill, with remainder over to her children; but, if she was married and had children at the time that the will took effect, then she would take absolutely a joint estate with the children.—*Nimmo v. Stewart*, 21 Ala. 682."

Without wishing to be understood as approving of all the decisions we have referred to, we cite them for the purpose of showing the strong disposition which the courts have manifested, in cases like the present, to con-

sider slight circumstances in the context as sufficient to justify them in holding that the parent shall take only for life, with remainder to his children. See, also, 2 Wms. Ex'rs, 938; McCroan v. Pope, 17 Ala.; Lushington v. Sewell, 1 Sim. 435; Newman v. Nightengale, 1 Cox, 341; Wilson v. Vansittart, Ambl. 562; Paine v. Wagner, 12 Sim. 188; *Baine v. Lescher*, 11 Sim. 397; Elmore v. Mustin, 28 Ala. 309.

In the present case, the gift is to a daughter and her children, the daughter having no children at the time. The words are, that in consideration of the donor's love and affection for his daughter, "and wishing to make permanent support for her and her children, I do hereby give," &c.; "but, in case the said Prudence shall die without an heir," (which expression, the context shows, is to be here construed in the sense of *child*,) "the said negroes to return," &c. The vesting of the absolute property in the daughter is inconsistent with the declared purpose of the donor, that the gift was to make *permanent* support for her and her *children*. Then the provision, that on her dying without a child, her brothers and sisters should take the negroes with their increase, fortifies the supposition, that the donor meant to give her but a life-estate, with remainder to her children. The donor's declared wish, that the children shall derive a permanent support from the negroes, is best accomplished by holding that they take, as remainder-men, the absolute property on the death of their mother.

It is unnecessary for us to determine, whether the daughter took the entire interest in the slaves for her life, or whether her children had, even during the life of their mother, a right to be supported by the services of the negroes, or a share in the profits of their labor. Nor do we feel called upon to decide, whether the terms of the deed were such as to exclude the marital rights of the husband of Mrs. Williams, (see *Furlow v. Merrill*, 23 Ala. 705,) nor whether the limitation over on the death of the daughter "without an heir" (or *child*) was too remote, (see *Stone v. Maule*, 2 Sim. 490; 2 Jarm. 437-8; 5 Day, 517; 6 Rich. Eq. 399; 25 Ala. 315.) We go as far as is at all

necessary, when we hold that, whatever interest vested in the daughter of the donor, terminated on her death, leaving children, and that her children then took the entire property as remainder-men.

[2—3.] We feel constrained, however, to hold, that the legal title of the trustee did not cease at the death of Mrs. Williams; and consequently, the interest of her children is equitable, not legal.—*Bryan v. Weems*, 29 Ala. 423; *Andrews v. Huckabee*, 30 Ala. 153-4. Neither the English statute of uses, nor the 8th section of our act of 1812, which was in force when this deed was made, and which was probably designed as a substitute for the English statute, has any application to personalty. *Lewin on Trusts*, p. 7; *Hill on Trustees*, 63, 230; *Clay's Digest*, 156, § 35. The legal title not being in the plaintiffs, the court did not err in the charge given. If the children of Mrs. Williams wish to proceed in their own names, they must assert their rights in another forum.

It was not shown that the record, which the plaintiffs offered in evidence, had any connection whatever with the property in controversy, or with the deed under which they claimed title; and if such connection were shown, we do not perceive the relevancy of the evidence to any of the issues in the cause. Even if it were admitted that the first trustee had resigned, and that Mr. Williams had been duly appointed trustee in his place, we do not perceive that the death of the substituted trustee would have the effect of vesting the legal estate in the children, so as to enable them to recover the possession of the slaves by suit in their own names.

Judgment affirmed.

NEWSOM vs. HUEY.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Presumption in favor of regularity of pleadings.*—When a demurrer has been sustained by the primary court, the appellate court will presume, unless the record affirmatively shows the contrary, that the causes of demurrer were specified, as required by the statute.
2. *Effect of demurrer.*—Under section 2253 of the Code, which requires a specification of the grounds of demurrer, a demurrer to a plea cannot be visited upon the complaint.
3. *Who is proper party plaintiff.*—It is not necessary, under section 2129 of the Code, that an action for a breach of warranty of the soundness of a slave should be brought in the name of the party really interested.
4. *Form and requisites of plea.*—A plea which assumes to answer the whole complaint, but does not negative the cause of action set out in one of the counts, is demurrable.
5. *Waiver of objection to competency of witness.*—After the testimony has been closed, and the argument of the cause has commenced, a party cannot claim, as a matter of right, that the testimony of interested witnesses, who were examined without objection on his part, should be excluded from the jury.
6. *General objection to evidence.*—A general objection to evidence, a part of which is admissible, may be overruled entirely.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by James G. L. Huey, against Silas Newsom, and was commenced on the 23d February, 1858. The complaint contained two counts; the first claiming \$1800 damages for a breach of warranty of the soundness of a slave, named Jack, which had been sold by defendant to plaintiff on the 16th March, 1857; and the second claiming \$1100, with interest from the 16th March, 1857, as so much money had and received by defendant for the use and benefit of plaintiff. The defendant filed three special pleas, each averring, in substance, that the plaintiff was not the party really interested in the suit. The judgment entry shows that the plaintiff

demurred to these pleas, and that his demurrer was sustained by the court; but the demurrer itself is not set out in the record, nor does it appear what (if any) causes of demurrer were specified. The defendant then pleaded the general issue, "in short by consent, with leave to give in evidence any matter that might be specially pleaded;" to which the plaintiff filed a replication, "with like leave." On the trial, the defendant reserved several exceptions to the rulings of the court on the evidence, which, however, require no special notice; and he now assigns as error all the rulings of the court, adverse to him, on the pleadings and evidence.

JOHN T. HEFLIN, for appellant.

L. E. PARSONS, and JOHN WHITE, *contra*.

A. J. WALKER, C. J.—We cannot sustain the appellant's assignment of error, that there was no specification of the grounds of demurrer to the appellant's pleas. The record does not affirmatively show that the demurrer was defective in that particular, and we cannot presume such deficiency.

[2.] There was no error in the failure to visit the demurrer to the pleas upon the complaint. The visitation of demurrers upon the antecedent pleadings of the party demurring is, in effect, abolished by the Code.—*Henly v. Bush*, 33 Ala. 636.

[3-4.] The first count of the complaint was for a breach of the warranty of the soundness of a slave. It was not a count upon "a promissory note, bond, or other contract, express or implied, for the payment of money;" and section 2129 of the Code does not require that a suit upon the cause of action set forth in that count should be "in the name of the party really interested."—*Henly v. Bush*, 33 Ala. 636; *Skinner v. Bedell's Adm'r*, 32 Ala. 44; *Bryan v. Wilson*, 27 Ala. 208. There was, therefore, no error in sustaining the demurrer to the defendant's three special pleas, which went to the entire action, and contained no matter of defense to the first count.

[5.] After the testimony had been closed, and the argu-

ment of the cause had commenced, the appellant could not claim, as a right, that the testimony of interested witnesses, who were examined without objection, should be excluded.—*Borland v. Mayo*, 8 Ala. 104; *Prosser v. Henderson*, 11 Ala. 484.

[6.] If any of the testimony objected to by the appellant was inadmissible, the objection was a general one, to the admission of it in connection with other evidence which was legal.

The judgment of the court below is affirmed.

McTYER vs. McDOWELL.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Powers of commissioner of general land-office, under act of congress of August 3d, 1846, and validity of sale ordered by him.*—Under the act of congress of August 3d, 1846, "providing for the adjustment of all suspended pre-emption land-claims," (U. S. Statutes at Large, vol. 9, pp. 51-2,) the commissioner of the general land-office being authorized to order, absolutely and unconditionally, the sale of lands which, under the provisions of that act, shall have reverted to the United States, the fact that he instructed the officers of the district land-office to offer such lands for sale, "if, after a careful examination of the books and maps in their office, there appeared on them no objection to offering the same for sale," does not affect the validity of the purchaser's title, when it is not shown that any valid objection to the sale appeared on the books and maps of the district office. Moreover, the said act of congress having confided the question of sale *vel non* to the discretion of the commissioner of the general land-office, and having failed to prescribe any mode of ascertaining the existence of the facts on which depended the propriety of a sale, the ordering of the sale by the commissioner is evidence that the facts existed which rendered such sale proper.
2. *Transfer of pre-emption right.*—Under the act of congress of May 29th, 1830, granting pre-emption rights to settlers on the public

lands, (U. S. Statutes at Large, vol. 4, pp. 420-21,) an assignment or transfer of the right of pre-emption, prior to the issue of a patent, is declared to be "null and void," and does not pass the right of pre-emption to the transferee; consequently, such transferee cannot defeat a recovery by one claiming^e under subsequent patent from the United States, by simply showing that the transferror, prior to his assignment, had a pre-emption right to the land, and offered to pay the entrance-money to the proper land-officers, but that they refused to receive it, and would not let him perfect his entry.

3. *Error without injury in rulings of primary court.*—Where the defendant's title is affirmatively shown to have been wholly insufficient to overturn the plaintiff's *prima-facie* case, the appellate court will not, at his instance, inquire into the correctness of any of the rulings of the primary court adverse to him.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Thomas C. McDowell, against Robert A. McTyer, to recover a tract of land containing two hundred and forty acres, which is described in the complaint as "the south-west quarter, and the west half of the north-west quarter, of section thirty-two (32), in township ten (10), range twenty-nine (29), in the district of lands subject to sale at Montgomery." The evidence adduced on the trial, and the rulings of the court thereon, are thus stated in the bill of exceptions.

"The plaintiff introduced a patent for the *locus in quo*, from the United States to himself, dated April 10th, 1850; and proved, that the entry was made on the 10th January, 1850. The defendant then proved, that in November, 1849, he bought the lands in question, for valuable consideration, from John H. Howard, (who was then in possession,) and immediately took possession, and from thence hitherto has been in possession, claiming said lands as his own under Howard's title-bond, which was given to him at the time of his said purchase. The defendant further proved, that John Nolan and Daniel Nolan, in and during the years 1833 and 1834, resided on and cultivated the east half of the north-west quarter of said section, and James Nolan resided on and culti-

vated the east half of the south-west quarter of said section; that said Nolans were so residing on and cultivating their respective tracts at the passage of the pre-emption act of 1834, and were then in possession as above stated; that they all duly applied, within the time prescribed by law, to the land-officers at Montgomery, whose duty it was to entertain such applications, for leave to enter said lands as pre-emptions, and made all necessary affidavits and proof to show their right of pre-emption; and offered to pay the purchase-money, and to do everything preliminary to the allowance of their pre-emption right in said lands; that said officers would not permit them, nor either of them, to enter said lands, nor to prove or take any right of pre-emption thereto, or to any part thereof, on the ground that said lands had been reserved and set apart to Creek Indian reservees, under the treaty of 1832 with the Creek Indians; that at the time of said application by said Nolans, and thence up to plaintiff's entry of said lands, the public books and maps in the land-office at Montgomery, relating to, showing and exhibiting said lands, were marked, in red ink, with the capital letters, *I. R.*; that the section embracing the *locus in quo* was so marked on said maps; that said letters stood for and meant *Indian Reservation*, and indicated that said entire section was reserved and set apart to Creek Indians under said treaty, and were so understood in said land-offices, and by every one inspecting said maps and books; and that said map was open to the inspection of the public. It was further proved, that said Nolans sold all their said pre-emption claims, about the last of the year 1834, to said John H. Howard, who paid them a valuable consideration therefor, took possession of said lands during the same year, claiming them as his own, and held and cultivated them from that time until his sale to the defendant in this case.

“The plaintiff proved, in reply, that said lands were offered for sale, in 1847, under the act of congress approved August 3, 1846, and under instructions from the commissioner of the general land-office to the land-officers at Montgomery; by which instructions, said officers

in Montgomery were ordered to offer said lands at public sale, if, after a careful examination of the books and maps in their offices, there appeared on them no objection to offering the same for sale. It was conceded, that said lands were never offered at public sale by the United States, except under the act and instructions above mentioned. The plaintiff also introduced copies from the books of the land-office at Washington, containing a statement, or memorandum, that a pre-emption certificate had issued in the year 1842, in favor of Daniel Nolan, for the east half of the north-west quarter of said section; another, in favor of John and Daniel Nolan, for the west half of the north-east quarter of said section; another, in favor of James Nolan, for the west half of the south-east quarter of said section; and that the east half of the south-east quarter was located to Kotechimiko, an Indian. The said Nolans, who were witnesses for the defendant, testified, that neither of them had ever applied for, received or accepted from the United States government any certificate, patent, or other evidence of title to any land in said section, and had never got any other land in lieu of their said pre-emption claims. Before the introduction of said copies in evidence, the defendant objected to their admission, if offered to prove the relinquishment of pre-emption to the lands in suit by said Nolans, or that they or either of them, as pre-emptors, had in fact entered the lands therein specified; but, though offered with such view, the court overruled the objection, and admitted said copies in evidence. The defendant also offered in evidence a copy of the original map on file in the department of Indian affairs at Washington, embracing the whole of said section thirty-two; on which map, the whole of said section, including the lands here in suit, was colored with red ink. Accompanying said map, were the following certificates." (The first certificate is that of "Charles E. Mix, acting commissioner of Indian affairs," to the effect that "the above is a correct extract from the map exhibiting the location of the Creek lands in Alabama, under the treaty of March, 1832; that said map designates township ten (10), range twenty-nine

(29), and that portion colored in red was assigned by Col. Abert to Creek Indian reservees." The other certificate is that of Robert McClelland, secretary of the interior, as to the official character of Charles E. Mix.) "The plaintiff objected to these certificates, on the ground that the keeper of the map could only certify to the truth of the copy, and not that the lands colored in red were Indian reservations, or that the red color meant Indian reservation. The court sustained the objection, and excluded the map; to which the defendant excepted."

"This being all the evidence in the cause, the defendant asked the court to charge the jury as follows:

"1. That [if] good objections to offering the lands in question for sale appeared on the books and maps of the land-office at Montgomery, at and before the advertising and offering of the same for sale, then the offering for sale was unauthorized.

"2. That if they believed the evidence in relation to the land being marked *I. R.*, and in relation to its being an Indian reservation, and in relation to the evidences thereof existing in the land-office at Montgomery, then they might find that good objections to offering the said land for sale did appear on the maps in the land-office at Montgomery, at and before the advertising and offering said land for sale.

"3. That if the offering of said lands at public sale by the United States officers was unauthorized, then the same was not subject to private entry, and the patent is void, as against McTyer, if he was in adverse possession, under *bona-fide* color of title, at the time of said entry; and that if they find the offering for sale unauthorized, and that McTyer was in actual possession under *bona-fide* color of title, then they must find for the defendant.

"4. That if they believed all the evidence, they must find that the lands in dispute were set apart to an Indian reservee, under the treaty of 1832; and, if so, they may find for the defendant.

"5. That if they find there was no Indian reservation, and that the Nolans, or some one of them, acquired a pre-emption right to the land in dispute, or to some part of

it, and offered to make proof and pay the purchase-money for the same, and to do all the law required to perfect their title, and were not permitted to do so by the land-officers, because of the lands being an Indian reservation, or of their saying or believing so,—then, as to the land in that predicament, the plaintiff is not entitled to recover.

“6. That if Howard bought the lands in dispute from the Nolans, and McTyer was in actual possession thereof, at and before the time of plaintiff’s entry, under *bona-fide* color of title, for which he had paid a valuable consideration, then the plaintiff’s entry of the land was irregular, and the patent, as against McTyer, is void.

“7. That if they believed the evidence in relation to the pre-emption right in the Nolans, then they must find for the defendant.

“8. That if they believed the evidence in relation to the lands in controversy being an Indian reservation, they must find for the defendant.

“9. That if they believed all the evidence, they must find for the defendant.

“The court refused each of these charges, and instructed the jury, in lieu thereof, that in order to invest the Nolans with such legal title as would defeat the plaintiff’s patent, they must have actually paid the entrance-money, and received a certificate.

“To all of which said several rulings of the court, as to the introduction of evidence, refusals to charge as requested, and charge given, the defendant excepted;” and he now assigns the same as error.

J. L. PUGH, for appellant.

JOHN COCHRAN, *contra*.

STONE, J.—It may be conceded, for the purposes of this opinion, that a patent which issues for lands which are reserved from sale, is void, and may be so declared in a proper case, either in chancery or at law.—See *Stephens v. Westwood*, 20 Ala. 275-8; *Ladiga v. Rowland*, 2 How. Sup. Ct. U. S. 581; *Crommelin v. Minter*, 9 Ala. 594; *Saltmarsh v. Crommelin*, 24 Ala. 347; *Stoddard v. Cham-*

bers, 2 How. U. S. 317; Hit-tuk-ho-mi v. Watts, 7 Sm. & Mar. 363-6; Gonzales v. Hoover, 6 Serg. & R. 118; Gingrich v. Foltz, 19 Penn. 38, 41; Wright v. Rutgers, 14 Missouri, 585.

The land in controversy in this suit was ordered into market, and sold, under the authority conferred on the commissioner of the general land-office, by the act of congress of Aug. 3d, 1846.—9 Statutes at Large, 51-2. By that statute, the commissioner was authorized to order into market, after due notice, and without the formality and expense of a proclamation of the president, all lands of a certain class—this being within the class—which, in his judgment, it would be proper to expose to sale. Under this statute, the commissioner of the general land-office instructed the land-officers at Montgomery to offer said lands at public sale, if, after a careful examination of the books and maps in their offices, there appeared on them no objection to offering said lands for sale. They offered these lands for sale, and no person purchasing them at said public offer, the plaintiff in this suit, some two or three years afterwards, purchased them at private sale, and, obtaining the patent of the general government, instituted this suit against the defendant to recover the possession.

It is contended for appellant, that this sale is void, because the commissioner of the general land-office did not himself order the lands into market, without referring any question to the land-officers at Montgomery. From anything that appears in the present record, we can not learn that there was in the land-office in Montgomery any evidence which showed that said lands should not be offered for sale, except the letters *I. R.* marked on the map of said section. These letters, *I. R.*, it is shown, when employed as in this case, are the initials of *Indian Reservation*, and, unexplained, denote that the lands thus marked are covered by locations to heads of Indian families, under the Creek treaty of 1832. It is manifest that the marking of these letters, *I. R.*, on the entire section 32, 10, 29, was the result of mistake; and as to the lands in controversy in the present suit, it does

not appear that, "on a careful examination of the books and maps in the land-office at Montgomery, there appeared on them any objection to offering said lands for sale." Under these circumstances, from any thing which appears to us, the commissioner of the general land-office, so far as evidence was afforded by the books and maps in the land-office at Montgomery, was authorized to order the said lands into market, absolutely and unconditionally. Having the absolute right to order the sale, it certainly cannot vitiate the title that he exercised greater circumspection than the law required at his hands. The legal import of his order was, *In my judgment, these lands should be ordered into market, and I direct you to offer them. If, however, on a careful examination of the books and maps in our office, you discover any sufficient cause for withholding the sale, then you are instructed not to put them into market.*

But there is another answer to this objection, which we think full and complete. It will be observed that, under the act of congress of Aug. 3d, 1846, the question of sale *vel non*, was confided to the judgment—*discretion*—of the commissioner of the general land-office. No limits were prescribed to the exercise of his judgment or discretion. He was made the sole judge of the propriety of a sale, and no rules, or mode of ascertaining the existence of the facts, were prescribed for him. The case is within the rule which declares, that where an officer is clothed with authority to do an act upon certain exigencies, and no rule is laid down for ascertaining that the exigency has arisen, the doing or performance of the act by the officer is evidence that the exigency exists. *Martin v. Mott*, 12 Wheat. 19; *Vanderheyden v. Young*, 11 Johns. 150; *Stuyvesant v. Mayor &c. of New York*, 7 Cow. 588.

[2.] What we have said above is applicable to this case as made by the plaintiff's title, and the acts of the land-officers which led to the sale. It does not reach the question of the pre-emption right as claimed by the Nolans. The bill of exceptions recites, that one of the Nolans lived on and cultivated the east half of the south-

west quarter of section 32, township 10, range 29, during the years 1833 and 1834; and that he was so occupying and cultivating said half quarter-section, when the act of congress of June 19th, 1834, was passed.—4 Stat. at Large, 678. That act revived the pre-emption act of May 29th, 1830, and continued it in force for two years from June 19th, 1834. The bill of exceptions further recites, that Nolan, within the time prescribed by law, offered to make to the land-officers at Montgomery proof of his cultivation of said land in 1833, and occupation on June 19th, 1834; that he offered to pay the entry-money, and that the land-officers refused to receive the proof or the money, because the land stood in their offices as an Indian reserve. The bill of exceptions does not inform us that any offer was made to enter any of the lands involved in this suit, except the said east half of the southwest quarter of section 32. Said Nolans, about the last of the year 1834, sold their said pre-emption claims to one Howard, who paid them a valuable consideration, and the same year took possession, claiming the lands as his own; and he continued in possession until he sold to McTyer, in 1849, since which time McTyer has held possession of the lands under said purchase. McTyer, when he purchased from Howard, received from him a bond to make title, and holds possession under claim of right. Under his possession and claim thus acquired, it is contended that plaintiff can not recover in this suit.

It is not pretended that Nolan, or any one claiming under him, has ever received any patent, or other evidence of title, from the federal government. This being the case, under the act of congress of 29th May, 1830, (4 Stat. at Large, 421,) the sale by Nolan to Howard, in 1834, was inoperative and void *as a transfer of Nolan's right of pre-emption*.—See last clause of § 3. If, then, there existed in any one a right to enter, by pre-emption, said land at the *minimum* government price, that right was in Nolan, and was not transferred either to Howard or McTyer, because the right to enter could not be transferred. Whether, under the statutes of 1830 and 1834, the abandonment of the possession by Nolan, and the sale by him to Howard

of all that was vendible in his claim to said land—viz., his right as against other private persons to occupy—was a surrender of his right to enter the land as a pre-emptor under the acts of congress of 1830 and 1834, we need not inquire. That question is not presented by this record.

The nature, extent and value of the right or claim conferred by the pre-emption statutes on actual settlers on the public lands, is a question upon which the adjudged cases do not agree. In some, it is held to be more than a mere privilege.—See *Lyttle v. Arkansas*, 9 How. U. S. 315-33; *Cunningham v. Ashley*, 14 *ib.* 377, 383, *et seq.*; *McAfee v. Keim*, 7 Sm. & Mar. 780; *Threadgill v. Pintard*, 12 How. U. S. 24; *Gingrich v. Foltz*, 19 Penn. 38; *March v. Gonsoulin*, 16 La. 84; *U. S. v. Fitzgerald*, 15 Pet. 407; *Perry v. O'Hanlan*, 11 Mo. 385; *Glanton v. Anthony*, 15 Ark. 543; *Wynn v. Morris*, 16 *ib.* 414; *U. S. v. Stanley*, 6 McL. 409; *Griffith v. Deerfelt*, 17 Mo. 31. See, also, *Glenn v. Thistle*, 23 Miss. 42; *Nelson v. Sims*, *ib.* 383; *Wright v. Rutgers*, 14 Mo. 585; 12 *ib.* 333. On the other hand, there are many authorities which hold, that the settler or pre-emptioner has no title which he can sell or incumber.—*Craig v. Tappin*, 2 Sandf. Ch. 78; *Wilkinson v. Mayfield*, 27 Miss. 542; *Brown v. Throckmorton*, 11 Ill. 529; *Gr. Gulf R. R. & Bank. Co. v. Bryan*, 8 Sm. & M. 234; *Doolittle v. Harrington*, 1 Morris, 226; *Delamay v. Burnett*, 4 Gilman, 454; *Bowen v. Higbee*, 9 Mo. 259.

In this State, this subject has been frequently considered. In *Rhea v. Hughes*, (1 Ala. 219,) this court, in speaking of the interest which a settler on the public lands acquires, said: "His interest in the land is a mere permission to occupy it, personal to himself, and not capable of transfer so as to give any legal right to any other person." In another place, the court had said: "It [his claim] is neither an estate by sufferance, at will, or for years, nor can the continued occupation of the land ever operate so as to create a legal title."—See, also, *Johnson v. Collins*, 12 Ala. 322; *McElyea v. Hayter*, 2 Por. 148; *Land v. Hopkins*, 7 Ala. 115; *Elmore v. Harris*, 13 *ib.*

360; Haden v. Ware, 15 *ib.* 149; Cruise v. Riddle, 21 *ib.* 791; Pettit v. Pettit, 32 *ib.* 288; Cothran v. McCoy, 33 *ib.* 65; Burns v. Hamilton's Adm'r, 33 *ib.* 210.

We do not, however, deem it necessary, in this case, to determine whether Nolan has forfeited all right to the lands in controversy, or whether he has any, and what remedy. The plaintiff below, by the production of his patent, made out a *prima-facie* case for recovery, and the defense offered was insufficient to overturn it, as we will now proceed to show.

The plaintiff, McDowell, by his patent from the United States, proved himself to be the owner of all the title which the federal government possessed, or could convey. He had purchased the land, and paid the government price for it. Nolan has paid nothing, and we can not know that he ever can or will pay the purchase-money for the land. Neither the United States, nor the plaintiff in this suit, has any power to compel him, either in law or equity, to pay the purchase-money. Neither McTyer nor Howard is the owner of Nolan's pre-emption right—we mean, his right to enter the land at the *minimum* price—because such right, before patent issues, is not the subject of sale. If, then, this mere privilege in Nolan, and possession in Howard and McTyer under him, can, at law, defeat a recovery by McDowell, the patentee, then McTyer or Nolan has acquired a perfect and independant title to this land, without paying the government or McDowell anything for it, and without incurring any liability to pay anything. An argument which leads to such results, is not sound.—Iverson v. Dubose, 27 Ala. 418.

[3.] We hold, that the defense relied on in this case is wholly insufficient to overturn the plaintiff's *prima-facie* case, and the court would have been justified in pronouncing it so. This being the case, we will not inquire whether the court may or may not have committed errors in the various rulings on the trial.—Gilmer & Taylor v. City Council of Montgomery, 26 Ala. 665; Shep. Dig. 568-9, §§ 82, 108.

Judgment of the circuit court affirmed.

SANDERS vs. GODLEY'S ADM'R.

[BILL IN EQUITY AGAINST LEGATEE BY JUDGMENT CREDITOR OF TESTATOR.]

1. *Conclusiveness of judicial decisions.*—Under a bill filed by a creditor, against the personal representative and several legatees of his deceased debtor, seeking satisfaction of his debt out of the property in the hands of the legatees, the guardian *ad litem* of the infant legatees put in a formal answer, denying all the allegations of the bill; one of which allegations was, that the testator was indebted to the complainant. The only evidence of indebtedness adduced by the complainant was a judgment against the testator's executor, rendered after the executor's assent to the defendants' legacies. On writ of error from the chancellor's decree, one of the assignments of error by the defendants was, the rendition of a final decree for the complainant without any proof of the testator's indebtedness to him. In the opinion of the supreme court it was said, "The debt against the testator is well established." *Held*, on a second appeal by the defendants, after the infants had attained their majority, and had put in an answer requiring proof of the testator's indebtedness to the complainant, that this opinion precluded inquiry into the legal question, whether a judgment against the executor, rendered after his assent to the defendants' legacies, was, as against them, evidence of the testator's indebtedness to the complainant.
2. *Marshaling assets between legatees and heirs-at-law.*—A creditor will not be allowed, in equity, to enforce satisfaction of his debt out of slaves specifically bequeathed, when the legatee shows that there are descended lands, which, as between himself and the heir-at-law, ought to be first subjected, but will be required first to exhaust the latter fund; but, when the effect of such arrangement would be to lessen or impair the obligation of the creditor's contract, or to subject his claim to any additional peril, or to unreasonably delay him in the enforcement of it, the court will not thus interfere; consequently, when it is not shown who the heirs-at-law are, nor whether they are within the jurisdiction of the court, and it appears that, while the specific legatees are precluded by a former decision of the court from contesting the justice of the creditor's demand, the testator was in fact an infant when the liability was contracted, and that the only evidence of the debt is a judgment rendered against the executor, the creditor will be allowed to pursue his remedy against the specific legatees.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. JOHN FOSTER.

THE original bill in this case was filed by Grandin F. Godley, on the 23d October, 1841, against Mrs. Sarah Sanders, James T. Kimble, and Nathaniel Terry as administrator *de bonis non* of John B. Fox, deceased; and sought to subject certain slaves in the hands of Mrs. Sanders and Kimble, to whom they were specifically bequeathed by said Fox, to the satisfaction of a judgment which the complainant, in the name of Horner, Blocker & Co. for his use, had obtained against Robert A. High, as the executor of said Fox, in February, 1841. After Mrs. Sanders had answered, giving the names of her children, who took a vested remainder in the slaves bequeathed to her for life, the bill was so amended as to make the children parties; and their guardian *ad litem* afterwards put in a formal answer for them, denying all the allegations of the bill. Answers were also filed by the other defendants. At the July term, 1850, the cause was submitted for final decree, on bill, answers, exhibits, and proofs; and the chancellor thereupon rendered a decree on the merits for the complainant, and ordered a reference of the matters of account to the master. At the July term, 1851, the master's report was confirmed, and a final decree rendered for the complainant. From this decree the defendants prosecuted a writ of error to this court, where an opinion was pronounced, at the June term, 1853, reversing the chancellor's decree, and remanding the cause.—See the case reported in 23 Ala. 473.

After the remandment of the cause, the death of the complainant was suggested in the chancery court, and the suit was revived in the name of James Throgmorton, as his administrator; and other parties were subsequently brought in, in consequence of deaths and marriages among the children of Mrs. Sanders. At the December term, 1856, the marriage of Mrs. Sanders with Thomas Travis was suggested, and said Travis was joined as a defendant with his wife. At the June term, 1857, leave was granted to the children of Mrs. Sanders (then Travis),

who had in the meantime attained their majority, to file new answers; but similar leave was refused to Travis and wife. In the answer then filed by the children it was averred, that the testator's executor, before the rendition of the complainant's judgment against him, had assented to the legacy to themselves and their mother, and had delivered the slaves to the trustee appointed for their mother; that there was a large surplus of personal assets belonging to the testator's estate, not specifically bequeathed, which was more than sufficient to satisfy the complainant's demand, and which, if not in the executor's possession at the time of the rendition of the complainant's judgment, had been wasted and misapplied by him; that the testator was seized and possessed, at the time of his death, of valuable real estate more than sufficient to satisfy the complainant's demand, which was not devised by him, but descended to his heirs-at-law; and that the testator was an infant at the time of his death, and they pleaded his infancy in bar of the suit. They also incorporated in their answer a demurrer to the bill—"1st, for want of equity; 2d, because it does not show that the complainant has exhausted his legal remedies; 3d, because it does not allege that the administrator *de bonis non* of the testator had not assets sufficient for the payment of his alleged debt; and, 4th, because it does not show that the testator had not undevised real estate sufficient in value for the payment of said debt."

At the December term, 1857, the cause was again submitted for final decree, on pleadings and proof; and at the ensuing May term, 1858, the chancellor pronounced his decree, in favor of the complainant, holding himself precluded by the former decision of this court from examining the defenses set up in the answer of the children. From this decree all the defendants appeal, and here assign the same as error.

R. C. BRICKELL, for appellants.—1. The judgment against the executor, rendered in February, 1841, is the only evidence adduced of an indebtedness by the testator to the complainant; and this judgment is shown to have

been rendered after the slaves bequeathed to Mrs. Sanders had been delivered by the executor to her trustee. If this judgment had been rendered before the executor's assent to the legacy, it would have been evidence against the legatee; for, until that assent was given, the executor was vested with the legal title, and the legatee with an equity only, and the relation of trustee and *cestui que trust* existed between them. But, by the assent of the executor, this relation is destroyed, and the legatee becomes clothed with the legal title: they are henceforth strangers, and a judgment against the executor is *res inter alios acta* as to the legatee.—Redmond v. Coffin, 2 Dev. Eq. 443; Sturges v. Beach, 1 Conn. 508; Marr's Executor v. Southwick, 2 Porter, 372; Darrington v. Borland, 3 Porter, 10.

2. The proof shows, that the testator was an infant at the time of his death; and his infancy is one of the defenses relied on in the answers. The promissory note of an infant is voidable.—Reed v. Bachelder, 1 Metcalf, 559; Jefford v. Ringgold, 6 Ala. 548. Infancy, although a personal privilege, may be pleaded by the legal representative of the infant. Thus, a guardian may avail himself of his ward's infancy, to avoid a conveyance of his lands; and a purchaser from, or devisee of the infant, may also take advantage of it.—Freeman v. Bradford, 5 Porter, 270; Jackson v. Burchin, 14 Johns. 124; Breckinridge v. Ormsby, 1 J. J. Mar. 248.

3. The proof further shows, that the testator had a large real estate, which descended to his heirs-at-law, and which was of value sufficient to pay the complainant's demand. Descended lands are liable to the payment of debts, before specific legacies, or general pecuniary legacies.—Lightfoot v. Lightfoot, 27 Ala. 351. The slaves sought to be subjected in this case were specifically bequeathed.—2 White & Tudor's L. C. 397 (top). This suit is of the nature of a bill for marshaling assets. The equity of the creditor is to have contribution from the legatees for the payment of his debt, because there is no other fund which he can subject. It is a remedy to which he is not entitled until he has exhausted all other remedies, or shows by his bill that a pursuit of them would

be fruitless. To a suit of this character, all the legatees who have received their legacies must be made parties; the several legatees are only ratably liable, according to the value of their respective legacies; and if any one of them is insolvent, his portion of the debt is not chargeable on the others, although their legacies may be of value sufficient to satisfy the entire debt.—2 Lomax on Ex'rs, m. p. 176; Darrington v. Borland, 3 Porter, 10; Pyke v. Searcy, 4 Porter, 52. It follows, therefore, that when there is shown to be another fund within the creditor's reach, which is primarily liable for the debt, and which he has not pursued, his equity against the legatee fails. The adoption of any other principle would arm the creditor with the power of changing the administration of the estate, and of nullifying the will of the testator. The expressions in the former opinion pronounced in this case, seemingly opposed to this position, are mere *dicta*, and are contrary to principle and authority.

4. The former opinion delivered in this case, (see 23 Ala. 473,) does not preclude a decision of the legal questions above presented. The general principle invoked by the appellee, and which the chancellor considered decisive of the case, is not controverted; but it is insisted, that that principle only applies when the case is presented a second time on the same pleadings and proof as at first, and that it does not prevent the parties from placing upon the record in the primary court facts "which the justice of the case required should be there."—Kenan v. Strange, 12 Ala. 294. When a case returns to this court on a different state of facts from the first, the court will decide it as thus presented, without regard to the former decision. Walker v. Forbes, 31 Ala. 10. When this case was formerly before the court, there was nothing to show that the executor had assented to the defendants' legacies before the rendition of the judgment against him, nor could that assent be presumed; and hence the court might then properly declare, that the debt against the testator was established. Nor did the record then show that the testator was an infant at the time of his death, or that he died seized of real estate which was sufficient for the pay-

ment of this debt, and which descended to his heirs-at-law. As the record then stood, evidence of these facts would not have been admissible, because the pleadings did not allege them. The former answer of the guardian *ad litem* was only a denial of the allegations of the bill. After the remandment of the cause by this court, the infants, having become of age, were allowed to put in new answers, alleging these facts.—6 Paige, 353.

D. C. HUMPHREYS, *contra*.—The former decision of this court, as reported in 23 Ala. 473, is the law of this case, and precludes further inquiry into the questions argued by the appellant's counsel.—See the cases collected in Shepherd's Digest, 574, § 173-74.

R. W. WALKER, J.—The only evidence adduced by the complainant of an indebtedness by the testator is the judgment described in the original bill, rendered against High, the executor, in 1841. It is shown that the slaves bequeathed to the legatees, who are parties to this suit, had been delivered to them by the executor before the rendition of that judgment; and it is now said, that, this being the case, the judgment against the executor is not evidence, as against the legatees, of an indebtedness by the testator. This may be a correct legal proposition, but we feel constrained to hold, that the former decision of this court, delivered when the case was here before, precludes us from considering the question.

At the former hearing, the answer of the guardian *ad litem* denied and put in issue all of the material allegations of the bill; one of which was, that the testator was indebted to the complainant. On that hearing, the only evidence offered of the testator's indebtedness was the judgment against the executor; and, construing the original bill most strongly against the complainant, it was sufficiently apparent from its allegations, that the slaves bequeathed to the legatees were in fact delivered to them before the rendition of that judgment. The bill alleges, that the slaves bequeathed to the defendants "have been distributed to them, and are now in their possession";

and that when the judgment was rendered against High, "he had no goods or chattels, lands or tenements, which could be reached by process of law, either in his own right, or as executor of the said Fox." One of the errors assigned on the former appeal was, "that a decree was rendered in favor of complainant without any proof of the indebtedness of John B. Fox." Such was the condition of the record when this cause was first here; and this court then said: "The debt against the testator is well established; the insolvency of the executor and of the executor's sureties is also well established; and the third fact necessary to complete the right to relief is just as clear, namely", &c.—See *Sanders v. Godley*, 23 Ala. 473–476. If the debt was then established by the proof, it is so now. In proving that the slaves bequeathed to the legatees were delivered to them before the rendition of the judgment against the executor, the defendants have not introduced into the record a new fact not shown by it when the case was before in this court. They have only proved what was already sufficiently apparent from the allegations of the original bill filed by the complainant. The former decision is the law of the case, and cannot be questioned, or reversed, on a second appeal.

It is proper to remark, however, that it does not appear that, when the former appeal was tried, the court specially considered the question, whether the fact that the judgment against the executor was rendered after his assent to these legacies, would destroy its effect as evidence against the legatees, of the indebtedness of the testator. Hence, although we must adhere to that decision as the law of *this* case, we might not consider ourselves bound by it as a precedent in another case. As to the effect of a judgment against the executor, as evidence against the legatees, see *Redmond v. Coffin*, 2 Dev. Eq. 443; *Lyon v. Vick*, 6 Yerger, 42; *Mason v. Peters*, 1 Munf. 437–446; *Atwell v. Milton*, 4 H. & M. 253; 2 *Williams' Ex'rs*, 1181–1189, and note; *Nunn v. Owens*, 2 Strob. 101; 2 *Lomax on Executors*, 134–5.

2. In the new answer filed by the children of Mrs. Sanders, after the case was reversed by this court, it is alleged,

that the testator died seized of a valuable real estate, situated in Limestone county, which was not devised by him, but descended to his heirs-at-law, and was of value sufficient for the payment of his just debts. The proof shows, that the testator did die possessed of lards in Limestone county, which were not disposed of by his will, and which were of value sufficient to pay the complainant's debt. These facts were not in the case when it was here before, and they raise a new question not then presented. There are expressions in the opinion then delivered, which the chancellor considered as favoring the idea that, inasmuch as the heirs-at-law were not parties to the suit, it was proper for the court to decree against the legatees, and leave them to adjust their equities with the heirs, in another suit. Thus, it is said: "If there had been no other legatees, who received property or effects of the testator, parties to the bill, inasmuch as Mrs. Sanders and Kimble were each shown to have received more property than would satisfy the debt, the decree might have been supported, and they left to adjust between themselves the question of contribution." Again: "If they" (the remainder-men) "were not parties to this bill, and their mother and Kimble should be decreed to pay it, there would be a way open to recover contribution of them."—23 Ala.473. We do not think that the expressions we have quoted are susceptible of the construction placed upon them by the chancellor. The question arising upon this branch of the case is, therefore, not settled by the former opinion.

The general doctrine is, that the personal property of a testator or intestate is the primary fund for the payment of his debts; and where a creditor has exhausted his legal remedies against the executor and his sureties, he may proceed in equity to subject the property in the hands of the legatees to the satisfaction of his demand.—*Sanders v. Godley*, 23 Ala. 476; *Darrington v. Borland*, 3 Por. 9; *Ledyard v. Johnston*, 16 Ala. 548.

In this State, although the personalty is the primary fund for the payment of debts, yet the real estate is also bound for them, irrespective of their character, to the same extent that recognizances and debts by specialty

bound real assets in England; and in marshaling the assets among the representatives of the realty and personality, descended lands will be subjected to the debts of the testator, in exoneration of specific legacies.—*Lightfoot v. Lightfoot*, 27 Ala. 351; 2 Lomax on Ex'rs, marg. pp. 243-249; 2 Spence's Eq. Jur. 830.

It is an undoubted principle of equity, that the election of a party who has a right to recourse against two funds, shall not be allowed to defeat the rights of another person who has recourse to or an interest in but one of them. *Aldrich v. Cooper*, 8 Vesey, 382; *White & Tudor's Lead Cases*, vol. 2, part 1, p. 185; 1 Story's Eq., §§ 558-9.

Some diversity of opinion has existed as to the mode in which the court will guard the rights of the person whose claim is confined to the single fund. All of the authorities agree, that if a creditor, having a choice of two funds, exhausts that one to which alone another claimant can resort, the latter will, in a court of equity, be subrogated to the rights of the former against the fund which is left untouched, and satisfied out of it to the extent to which the fund pursued by the creditor has been exhausted.

Many courts have gone a step beyond this, and held that, where one claimant has more than one fund to resort to, and another claimant only one, the first will be confined in the first instance to that which is beyond the reach of the second. Other courts declare the rule to be, that equity will not interfere with the election of a creditor in the first instance, unless he has been guilty of some neglect or default, although it will not allow that election to be the means of ultimate disappointment to other claimants. The practice of the courts last alluded to is, not to interfere for the purpose of excluding a creditor from one fund, and restraining him to another, but to protect other claimants of the fund which he has chosen to pursue, by subrogating them to his remedies against, and satisfying them, *pro tanto*, out of that which he has left untouched.

The question, whether the protection afforded by courts of equity in such cases may be by restraint, as well as subrogation, is thoroughly discussed by the American

editors of White & Tudor's Leading Cases, (vol. 2, pt. 1, pp. 229-35,) where the principal decisions upon the subject will be found collected and classified.—See, also, 1 Spence's Eq. Jur. 827, *et seq.*; 1 Story's Eq. §§ 559, 636.

The decisions of this court seem to recognize the rule first stated—namely, that where a creditor has two funds out of which he can satisfy his debt, and another party has a claim on only one of them, a court of equity will compel the creditor to resort in the first instance to that fund which the other party cannot reach.—Nelson & Hatch v. Dunn, 15 Ala. 517; Chapman v. Hamilton, 19 Ala. 126.

But the present case does not require us to decide whether a court of equity will so far interfere with a creditor, who has the choice of two funds, as to restrain him in the exercise of his purely *legal* remedies against either of them. The right of the creditor of the testator to follow legacies assented to, is a mere *equity*, and should not be enforced inequitably.—McLure v. Askew, 5 Rich. Eq. 162. If a legatee, who is thus pursued in equity, shows that there is another fund subject to the satisfaction of the creditor's demand, and which, as between the legatee and the person in possession of it, ought to bear the burden of the debt, it is only equitable, we think, to require the latter fund, on which the legatee has no claim, to be exhausted before the legacy is subjected.—See Cornish v. Wilson, 6 Gill, 299; 1 Story's Eq. § 557; Chapman v. Hamilton, 19 Ala. 126; McElway v. N. Eng. Man. Company, 1 Stockton's R. 36. The mere subrogation of the legatee to the remedies of the creditor against the other fund would often be inadequate relief, especially in cases like the present, where the legacy is of slaves, the loss of which would not, perhaps, be fully compensated for by the recovery of their mere pecuniary value.

It must, however, be borne in mind, that equity will not control a creditor in the use of any remedy to which he may be entitled, except when it can be done without injury to him, and is necessary for the protection of others. Great care must be taken, in making such an arrangement, not to lessen or impair in any manner whatever the obligation of the creditor's contract, nor to subject his

claim to any additional peril, nor to unreasonably delay him in the enforcement of it.—Post v. Mackall, 3 Bland, 511; Dorr v. Shaw, 4 Johns. Ch. 17; Wright v. Simpson, 6 Vesey, 714, and note to p. 737, (Sumner's ed.); Morrison v. Kurtz, 15 Ill. 193; Briggs v. Planters' Bank, 1 Freem. Ch. R. 574; 2 White's Lead. C., pt. 1, pp. 232, *et seq.*; Adams' Eq. 272, note 2; 1 Story's Eq. § 560; U. States v. Duncan, 12 Ill. 523; Behn v. Young, 21 Geo. 207; Gen. Ins. Co. v. U. S. Ins. Co., 10 Maryland, 517.

Now in this case, the former decision of this court precludes the *legatees* from contesting the justice of the complainant's demand as a debt of the testator. But the judgment against the executor is not evidence of the debt, as against the *heirs*.—2 Lomax's Ex'rs, m. p. 252; 4 Phil. Ev. (C. & H.'s ed. 1850,) p. 7; 3 Porter, 10. The record of that judgment is the only evidence which is furnished of the creditor's demand. Besides this, it is shown that the testator was a minor at the time he contracted the liability which is the foundation of the judgment. Under these circumstances, while we are constrained by the former decision of this court to hold that the *legatees* are precluded from disputing the existence of the complainant's debt, we are not prepared, upon the evidence shown by this record, to say that his demand is one of which he could enforce satisfaction out of the testator's descended lands in the hands of the heirs-at-law. Besides, it is not shown who the heirs-at-law are, nor whether they are within the jurisdiction of the court.

If we concede that the claimant of a fund which is pursued by a creditor can, in any case, compel the latter in the first instance to seek satisfaction of his demand out of another fund, it must at least be shown that this other fund is bound for the creditor's demand, (unless, indeed, it has been released from its liability by his neglect or default,) and that his remedy for reaching it is prompt and efficient.—Authorities *supra*; 1 Story's Eq. § 562.

These appellants, therefore, had no right to turn the complainant aside from his pursuit of them, and compel him to seek satisfaction out of the heirs, unless it appears from the record that the complainant had the right to

subject the testator's descended lands to the satisfaction of his demand, and that he can now be excluded from resort to the legacies, and turned over to pursue his remedy against the heirs or the descended lands, without danger of losing, or being unreasonably delayed in the collection of his claim. As we cannot assert that these essential facts are shown by the record, we do not perceive that the chancellor erred in his decree against the defendants. If the heirs-at-law, or the descended lands, were, in point of fact, liable for this debt, it may be that the legatees can proceed against them for indemnity in another suit.

Decree affirmed.

FAIL & MILES vs. McREE.

[ACTION FOR BREACH OF SPECIAL CONTRACT.]

1. *What constitutes partnership.*—A contract, by which the plaintiff agreed to let the defendants have all the pine timber on his lands that was suitable for good lumber, and the defendants agreed to pay him therefor, annually, in money, one-fifth of the gross proceeds of the lumber sold and collected by them, does not constitute the parties partners *inter sese*.
2. *Construction of special contract for sawing lumber: performance, and breach.*—Under a contract by which the plaintiff agreed to let the defendants have all the pine timber on his lands that was suitable for good lumber, and the defendants agreed to saw the same into lumber and sell it as soon as they could, to saw no other lumber until it was done, and to pay the plaintiff, annually, in money, one-fifth of the gross proceeds of the lumber sold and collected by them,—neither the dissolution of the partnership in the mill business between the defendants, nor the sale of the mill under a mortgage executed by one to the other of them, discharges them from the further performance of their contract, which is continuous and entire, and which binds them to performance within such time as will suffice for its accomplishment by the use of a reasonable investment and effort.

3. *Damages.*—For the breach of such a contract by the defendants, in failing and refusing to saw all the timber on the plaintiff's land, but one action lies in favor of the plaintiff: in which, although the time of performance may not then have elapsed, he is entitled to recover damages for the continued and prospective failure of performance, to be assessed upon the basis of value at the time of the breach; and the measure of his recovery is the profits which would have accrued to him from the defendants' performance of their contract, to be ascertained by deducting the value of the timber left unsawed from one-fifth the value of the timber which it would have made.
4. *Relevancy of evidence to prove performance.*—In an action to recover damages for a breach of one of the stipulations of a contract, evidence showing the defendant's performance of another distinct stipulation is irrelevant.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by W. F. McRee, against the appellants, late partners doing business under the firm name of Fail & Miles; was commenced on the 13th March, 1857, and was founded on the defendants' breach of a written contract between them and the plaintiff, in the following words:

"Agreement between W. F. McRee and Jeremiah Fail and E. J. Miles: Said McRee agrees to let said Fail & Miles have the saw-pine—all the pine suitable to make good lumber—on all of his land, including eighty acres lately bought by him from J. M. Burk. Said Fail & Miles agree to pay said McRee, annually, in clear money, one-fifth of the gross proceeds of all sold and collected, and that they will saw and sell said lumber as soon as they can—no other timber will they saw until it is done. May 21st, 1854."

(Signed by all the parties.)

The complaint alleged the following breach of this agreement: "Plaintiff avers, that he has performed said agreement on his part, but that said defendants have not performed the same on their part, in this—that said defendants did not saw all the pine suited to make good lumber on the plaintiff's said land, referred to in said

agreement; and plaintiff avers, that defendants could have sawed all the pine suited to make good lumber on plaintiff's said land, of which there was a large quantity on said land; but said defendants, well knowing this, have nevertheless failed and positively refused to saw said pine, though specially requested by plaintiff so to do; whereby plaintiff has sustained damage," &c. The defendants demurred to the complaint, on the specified ground (with others) "that the contract declared on shows a partnership between said plaintiff and defendants, and, consequently, no action at law can be maintained thereon." The court overruled the demurrer, and the defendants then pleaded—1st, the general issue; 2d, a special plea, averring that the contract sued on created a partnership between the parties; and, 3d, performance. A demurrer was sustained to the 2d plea, and issue was joined on the 1st and 3d pleas.

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the contract declared on, after proving its execution, "and then proved that, before and at the time of the making of said agreement, he was the owner in fee of about four hundred acres of land, on most of which there was pine timber suitable for sawing; that said land was situated near a steam saw-mill, which the defendants were then erecting and about to put in operation; that said defendants, as partners, commenced to run their said mill in June, 1854, and continued so to operate it until about the 7th March, 1857, when it was sold at public auction, under a mortgage executed by said E. J. Miles to said Jeremiah Fail, and was bought at the sale by one J. W. Bridges; and that the defendants had not run or operated any other saw-mill since that time. The plaintiff further proved, that he had a conversation with Jeremiah Fail about said sale, just before it took place, in which he asked said Fail, whether, if the mill was sold, the said contract would be carried out and completed, by sawing up and selling the remaining unsawed timber upon his lands suitable for sawing; that said Fail replied, that it would not—that he should sell the said mill, and did not consider that the contract required him to do anything

more towards carrying it out; that the contract would be at an end upon the sale of said mill, and that he would not saw up any more of said timber. The proof further showed, that the partnership between the defendants was dissolved on or about the day said mill was sold as aforesaid; and that the plaintiff, after the institution of this suit, had nine hundred pine trees, suitable for sawing up into lumber, still standing upon his said lands. The plaintiff then offered to prove the value of said trees as they stood during the year 1857,—stating to the court, that the object of said testimony was to arrive at the proper measure of damages for the alleged breach of said contract by the defendants in failing and refusing to saw said pines; that he expected to prove the average value of each of said trees, the average quantity of lumber each would make when sawed up, and the market price of the lumber at the said mill; and that by deducting the value of the trees from the value of the lumber which they would make when sawed up, and estimating one-fifth of the remaining gross aggregate value of the lumber, the true measure of damages for the alleged breach would be arrived at. The court admitted the evidence for this purpose, against the defendants' objection, and the defendants excepted. The plaintiff then proved, that the average value of said trees was between fifty and sixty cents each, as they stood upon the land; that each tree would make between four hundred and fifty and five hundred feet of lumber, and that the lumber would have been worth at the mill about ten dollars per thousand feet."

"The defendants then proved, that they entered upon the execution of said agreement in June, 1854; that at the time of the execution of said agreement, as the plaintiff knew, they were building said mill as partners, and were about to start and run the same as copartners; that plaintiff's said lands were convenient and near to said mill; that the copartnership between defendants was dissolved about the time of the sale of said mill as aforesaid, and that they had run the same as copartners up to that time. The defendants also proved and read in evidence the plaintiff's receipt, dated the 5th June, 1857,

for \$640, in full for his share (one-fifth) of the lumber sawed at the mill during the years 1856 and 1857. The plaintiff claimed damages only for an alleged breach of said contract by the defendants in failing and refusing to saw and sell the said nine hundred trees remaining on said lands; and the proof above set forth was, in substance, all the evidence introduced in relation to said alleged breach.

“The court thereupon charged the jury as follows:

“1. That the legal construction of the agreement between the plaintiff and defendants was, that the plaintiff thereby obligated himself to furnish all the pine trees on his said lands suitable for making good lumber, and that the defendants obligated themselves to saw it all into lumber, and to sell the same, within a reasonable time, and to saw no other lumber until they had sawed all of the plaintiff's said timber, and then to pay him in money, annually, one-fifth of the gross proceeds of all the said lumber sold and collected; and that the defendants were bound by law, under said contract, to saw the whole of said timber within a reasonable time after the making of said contract, without any discretion on their part as to whether they would do so or not; and that this was the law, notwithstanding the proof might show that the defendants' mill had been sold under mortgage, and that they had dissolved their copartnership, and had not since carried on the business of sawing and selling lumber; and although they might further believe that the defendants, up to the time when their mill was sold and their copartnership dissolved, had fully carried out their said contract.

“2. That if they believed from the evidence that the defendants had not, prior to the institution of this suit, sawed up and sold trees, to the number of nine hundred, standing on the plaintiff's lands embraced in the contract, but had refused to saw up the same, and had repudiated the said contract, and had refused to proceed further in its execution,—then they were guilty of a breach of their said contract; and that if the proof showed what said trees were worth, as they stood upon the lands, in 1857,

and what quantity of lumber they would have made if sawed up into lumber by the defendants under their said contract, and what said lumber would have been worth if it had been thus sawed,—then the proper measure of damages for said breach would be, one-fifth of the aggregate gross amount of the value of such lumber, after deducting therefrom the aggregate value of the trees as standing upon said lands, as shown by the proof.

“3. That the plaintiff’s receipt, which had been offered in evidence as above stated, had no relation to the alleged breach of said contract for failing or refusing to saw said trees on plaintiff’s lands, if such failure or refusal was proved; and, therefore, if they believed the facts stated in this bill of exceptions to be true, said receipt should have little or nothing to do with their verdict.

“To each of these charges the defendants excepted, and then requested the court to instruct the jury, that although they might believe the facts set out in this bill of exceptions to be true, yet, if there was no evidence showing, or tending to show, that the defendants could, before the commencement of this suit, in the ordinary progress of such a business at a saw-mill, have sawed up the said trees into lumber,—then, according to the measure of damages ruled by the court (in its second affirmative charge) to be correct, they cannot find for the plaintiff. The court refused to give this charge, and the defendants excepted.”

The rulings of the court on the pleadings, on the evidence, and in the charges given and refused, are now assigned as error.

WATTS, JUDGE & JACKSON, for appellants.

D. W. BAINE, with ALEX. WHITE, *contra*.

A. J. WALKER, C. J.—The only objection taken in the defendants’ demurrer, which is applicable to the complaint as amended, is, that the agreement between the plaintiff and defendants created a partnership. The same question is also raised by the defendants’ second plea. Hence, the overruling of the demurrer to the complaint,

and the sustaining of the demurrer to the 2d plea, present the single point, whether a partnership resulted from the agreement between the parties. The agreement gives to the plaintiff one-fifth of the gross proceeds of the sales of lumber, as a compensation for the timber supplied; and, upon principles settled in *Moore v. Smith*, (19 Ala. 774,) does not constitute the parties partners *inter sese*. The rulings of the court upon the pleadings were, therefore, correct.—*Smith v. Garth*, 32 Ala. 368.

[2.] It was an obligation of the defendants, under the contract, to saw all the pine timber on the plaintiff's land, suitable for making good lumber, as soon as they *could*, and to saw no other timber until they had done so. There is no reservation to the defendants of a discretion, as to whether they should comply with those obligations; nor is the duty of compliance with them made to depend upon a continuance of the partnership; nor is there anything in the terms of the contract, which absolves the defendants from their obligation upon a sale of their mill under a mortgage. To give the contract such an effect, would be inconsistent with the mutuality of duty which it was the design of the contract to create. The obligation to allow the timber to be taken, and the obligation to take and saw it, are reciprocal; and, as the plaintiff had no discretion as to whether he would supply the timber, and no authority to discontinue the supply in any given contingency, so the defendants could have no discretion as to whether they should take the timber, and no legal right, in either of the contingencies above specified, to cease to take it. There being no specified time for the performance of the contract on the part of the defendants, the law implied an obligation to perform within a reasonable time, to be determined in the light of all the circumstances. When the contract says, that the defendants should perform their contract as soon as they *could*, it means, neither that they should perform it as soon as it was physically possible by the aid of every conceivable means promotive of expedition, nor within such time as would suit their interest, convenience or inclination; but, within such time as would suffice for its accomplishment

by the use of a reasonable investment and effort.—Garnett v. Yoe, 17 Ala. 74; Watts v. Sheppard, 2 *ib.* 425; Dickson v. Briggs, 12 *ib.* 217; Allen v. Green, 10 *ib.* 34; Skinner v. Bedell, 32 *ib.* 24; Drake v. Goree, 22 *ib.* 209; Adams v. Adams, 26 *ib.* 272; Hussey v. Roquemore, 27 *ib.* 281; Wolfe v. Parham, 18 *ib.* 441.

The refusal of the defendants to proceed with their contract, according to its requisitions, was certainly a breach of it, and gave rise to an immediate cause of action in favor of the plaintiff.—Davis v. Ayres, 9 Ala. 292; George v. Cahaba & Marion R. R., 8 *ib.* 234; Ramey v. Holcombe, 21 *ib.* 567; Fowler & Prout v. Armour, 24 *ib.* 194. The contract on the part of the defendants was continuous in its character; it was also entire, and the performance is not by the contract divided—different parts assigned to different periods of time.

[3.] For the breach of such a contract, but one action lies, and the plaintiff must recover in a single action his entire damages.—Ramey v. Holcombe, 21 Ala. 567; Snedecor v. Davis, 17 *ib.* 472; Sedgwick on the Measure of Damages, 224. Notwithstanding the period of performance had not expired at the time of the breach of the contract, and at the time of action brought, the plaintiff must recover in the single action the damages which would result from the continued and prospective failure of performance, for he cannot bring a second action. Perhaps, if the time within which the contract might have been performed had elapsed before the trial, and the amount of performance which would have transpired each year could have been ascertained, the value of the timber and lumber which would have been consumed and sold each year, estimated as of that year, would have been adopted in determining the damages; and thus injury to either party from fluctuation in value would have been avoided. But, as this case is not shown to have presented such features, the damages ought to be assessed upon the basis of value at the time of the breach. The authorities, which we cite below, fully sustain our propositions, as to the plaintiff's right to recover the prospective damages, and as to the time for taking the estimate of damages.

Sedgwick on the Meas. of Damages, 225-226-227-228-229; Seaten v. Second Municipality of New Orleans, 3 Ann. (La.) 44; Masterton v. Mayor, &c., 7 Hill, 61; New York & Harlem R. R. v. Story, 6 Barb. S. C. R. 419; Shaffer v. Lee, 8 *ib.* 412.

The measure of the plaintiff's recovery was, the profits which he lost by the refusal of the defendants to perform their contract; and those profits are to be ascertained, by deducting the value of the timber from one-fifth the value of the lumber which he would have received, if the contract had been performed.—Ramey v. Holcombe, *supra*; George v. Cahaba R. R., 8 Ala. 234.

[4.] The action was brought to recover damages for the breach of the contract by a refusal to continue to perform it, and not to recover a sum of money, which was due on account of the use of timber in the past performance by the defendants. The plaintiff's receipt, showing a payment to him for timber which had been taken in the past performance of the contract, was irrelevant.

Judgment affirmed.

PIKE vs. ELLIOTT.

[TRESPASS QUARE CLAUSUM FREGIT.]

1. *Form and sufficiency of complaint.*—In trespass for injuries to land, it is not necessary that the complaint should allege that the land is situated in the county in which the action is brought: if it conforms substantially with the form given in the Code, (p. 555,) it is sufficient.
2. *Relevancy of evidence distinguished from sufficiency.*—In trespass *quare clausum fregit*, the evidence of a witness who testifies to a trespass committed by defendant on lands belonging to plaintiff, but cannot identify those lands as the lands described in the complaint, cannot be excluded from the jury on motion.
3. *Admissibility of party's own declarations.*—The declarations of a party, not constituting a part of the *res gestæ*, are not competent evidence in his favor.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. NAT. COOK.

THE complaint in this case was as follows:

"John C. Elliott } The plaintiff claims of the defendant
vs. } five hundred dollars, as damages for
James A. Pike. } trespasses by defendant to the close
situated on the following lands, to-wit—the south-east
quarter of section twenty-five, township seventeen, range
fourteen—which said close was in the possession of the
plaintiff; and for pulling down the fence around said
close, treading down the grass and corn of the plaintiff,
and with cattle eating up and destroying the said grass
and corn, then and there being in said close, to-wit, on
the — day of —, 1859, and on divers other days between
that and the bringing of this suit."

The defendant demurred to the complaint, and assigned the following causes of demurrer: "1st, that the close mentioned in said complaint is not sufficiently described; and, 2d, that the locality of the close is nowhere indicated in the complaint." The court overruled the demurrer, and the defendant then pleaded the general issue, "with leave to give in evidence any special matter of defense."

"On the trial," as the bill of exceptions states, "the plaintiff introduced as a witness one Rutledge, who testified, that he sold to the defendant, in the spring of the year 1859, a piece of land containing eighty acres, the numbers of which according to the government surveys he did not know; that he had rented to the plaintiff, some time before the said sale, fourteen acres of the said land, which the plaintiff had planted in corn; that the defendant took possession of the entire tract, except the part which had been rented to the plaintiff; that the defendant had a piece of corn in a stubble-field, in which were growing grass and volunteer oats, under the same fence that enclosed the field rented by plaintiff; that there was no fence between the defendant's field and the plaintiff's corn, but they were separated by a creek, upon whose banks were weeds, bushes and brambles, through

which stock might well have passed, and which was crossed at one place by a road, and the crossing secured by a fence. The witness further testified, that he had seen defendant's horses in the stubble-field, on the side of the branch opposite to the plaintiff's corn-field; that plaintiff's corn was well planted, and his entire field, if well cultivated, would have produced fifteen bushels per acre, but his entire crop, after getting somewhat advanced, had been destroyed by stock; that the fence around the field containing plaintiff's corn was low and rotten, and stock could easily have jumped over it; and that he saw, during the summer, one place at which stock had jumped into the field. The defendant then moved the court to exclude the evidence of this witness from the jury, because he could not, and did not, state that the land of which he testified was the same as that described in the complaint. The court overruled the motion, and the defendant excepted.

“The plaintiff introduced evidence tending to show, that he had cultivated his corn well; that corn was worth fifty cents per bushel during that summer, and had risen to one dollar per bushel in the fall; that the plaintiff and defendant had a conversation, in which plaintiff told defendant, that a free negro who was living on defendant's place, and whom plaintiff had frequently seen about defendant's house, had turned horses into the stubble-field, and that he intended to whip him for it; that defendant replied, he had better not do that, as the negro had leave to turn them in. The defendant then introduced as a witness one Barry Rutledge, who testified, that he one day went to defendant's house after his father's oxen, and found them in defendant's lot, with poles tied across their heads, in front of their horns. Defendant asked said witness, what he (defendant) said about the oxen having poles on their heads. To this question the plaintiff objected, because it called for the defendant's declarations; the court sustained the objection, and the defendant excepted. The defendant then asked said witness, whether he (defendant) did not say he had tied the poles on the oxen to keep them out of the plaintiff's field.

The plaintiff objected to this question, and the court sustained the objection; to which the defendant excepted."

The overruling of the demurrer to the complaint, and the rulings of the court on the evidence, are now assigned as error.

TAUL BRADFORD, for appellant.

JAS. B. MARTIN, *contra*.

STONE, J.—It is objected to the complaint in this case, that it does not aver that the land on which the alleged trespass was committed is in Talladega county. We have compared the complaint with the form furnished by the Code, (page 555,) and find that it contains every material requisite expressed in the form. The form, like the present complaint, omits all mention of the venue, or *situs* of the *locus in quo*. The complaint, being a substantial copy of the form given in the Code, must, under our previous decisions, be held sufficient.—*Noles v. The State*, 24 Ala. 672; *Letondal v. Huguenin*, 26 *ib.* 552; *Pickens v. Oliver*, 29 *ib.* 528.

[2.] The defendant's motion to exclude the evidence of the plaintiff's witness, Rutledge, was rightly overruled. True, that evidence may not have been sufficient, of itself, to make out the plaintiff's case. There is a wide difference, however, between the relevancy and the sufficiency of evidence. The testimony tended proximately to prove certain material points in the plaintiff's right of recovery, and, for that reason, it was relevant. If, after the plaintiff had closed his evidence, it failed to make out his case, either by an entire omission of testimony to some indispensable fact, or in some other way, it was the privilege of the defendant to have the judgment of the court on such question. In this case, we are not informed what additional proof the plaintiff offered. The proof being relevant, the court did right in refusing to exclude it from the jury.—*Bryant v. Hutcheson*, 30 Ala. 441; *Paulling v. Watson*, 21 *ib.* 279.

[3.] To have admitted the testimony of Barry Rutledge, would have been to allow the defendant to give his own

declarations in evidence. They were not admissible under the doctrine of *res gestæ*.

The judgment of the circuit court is affirmed.

FULLER vs. DUREN.

[APPEAL FROM JUSTICE'S COURT, ON COMMON COUNTS IN ASSUMPSIT.]

1. *When assumpsit lies.*—If the defendant has wrongfully sold the plaintiff's property, and received for it money, or something else as money, the plaintiff may waive the tort, and maintain assumpsit for the money; but this principle does not apply, where the defendant has simply exchanged the property, and has not sold or otherwise disposed of the property obtained in exchange.
2. *When recovery may be had under common counts.*—Under a complaint containing only the common counts for money had and received, and for goods sold and delivered, a recovery cannot be had for the breach of a special contract, by which the plaintiff authorized the defendant to sell a horse belonging to them both jointly, and which the defendant violated by exchanging the horse for another, and retaining the latter as his own property.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Mrs. Malila Duren, against Gallatin Fuller, and was commenced in a justice's court. After the removal of the cause to the circuit court, the plaintiff there filed a complaint in the following words: "The plaintiff claims of the defendant fifty dollars, for goods, wares and merchandise, sold by plaintiff to defendant on the 1st of January, 1857; and the further sum of fifty dollars, for money had and received by the defendant, to and for the use of the plaintiff, on the 1st January, 1857, with interest thereon." The defendant pleaded the general issue, "in short by consent, with leave to give anything in evidence that might be specially pleaded in

bar, and with like leave to the plaintiff by way of replication.

“On the trial,” as the bill of exceptions states, “the testimony offered in behalf of the plaintiff tended to show, that she was a widow when the suit was commenced; that her late husband, a short time before his death, applied to the proper department at Washington for a forty-acre land-warrant, but died before the warrant was received, and before the result of his application was known; that the warrant came to hand soon after his death, and the plaintiff endeavored to dispose of it, but was unable to do so, because there had been no administration on his estate, which was too small to bear the expense of an administration; and that she then requested the defendant to assist her in disposing of said land-warrant, or to dispose of the same for her. In consequence of this request, as the evidence further showed, the defendant did assist plaintiff to dispose of said land-warrant in the following manner: Defendant met with one Pike, who wished to trade a small pony filly for land-warrants, and told him, that he had a warrant of his own, and thought he knew where he could get another; that he was indebted to the plaintiff, and that she had a warrant of her own. Defendant and said Pike thereupon went to plaintiff’s house, where the trade was consummated for the filly; each of the land-warrants being estimated at \$50, and the filly at \$100. The proof tended to show, that the filly was delivered by Pike to the plaintiff, that the trade was made with her, and that the defendant let her have his land-warrant for that purpose; while, on the other hand, the proof tended to show, that the trade was made by defendant, in the presence of plaintiff, with her knowledge and consent, and for their mutual benefit; that the defendant put in his warrant merely to enable plaintiff to dispose of hers, and that the filly was delivered by Pike to defendant, or to him and plaintiff jointly. The proof further tended to show, that the plaintiff did not at that time owe the defendant anything; that he said this merely to afford a reason for letting her have his warrant; and the plaintiff herself

admitted, while testifying in the case, that the defendant did not owe her anything at that time. The proof tended to show, also, that while the filly was in the defendant's possession, he traded or swapped her off for another horse, before the commencement of this suit; that the defendant's land-warrant, which was regular in all respects, was worth in market \$44 at the time the trade with said Pike was made, in January or February, 1854, while the plaintiff's warrant was worth nothing in market. The plaintiff's evidence tended to show, that the filly was worth from \$80 to \$100; the defendant's, that she was worth from \$70 to \$75. The plaintiff's evidence further tended to show, that the defendant had proposed to pay her for her interest in the filly after he had swapped her off; that the plaintiff refused to accept what he offered her, but had received \$25 from him. The defendant's evidence tended to show, that he had paid plaintiff \$30 on account of her interest in the filly; and that the filly and horse were each worth from \$70 to \$75. The proof tended to show, also, that the plaintiff had no use for the filly obtained from Pike, and had requested defendant to sell it, and to pay her one-half the money he might obtain; that defendant tried to do so, but could not get \$70 for her; that he sold one of his own horses, of which he had a surplus, and used the filly a week or two in making his crop before he swapped her off; that defendant and Pike both knew how plaintiff came into the possession of the land-warrant, and that there was no administration on the estate of plaintiff's husband. Pike testified, that he sold the land-warrant obtained from plaintiff at a profit, and had always been satisfied with the trade. The proof showed, also, that the defendant had not received any money for the filly, or the one he swapped for.

"Thereupon, the court charged the jury, that if they believed from the evidence, that defendant told Pike, that he owed plaintiff some money, that he and plaintiff each had a land-warrant, and that if Pike would go with him to plaintiff's house, he would let her have his warrant in payment of what he owed her, and that plaintiff could, with that and the warrant she held in the name of

her deceased husband, give Pike a trade for his filly; that Pike and defendant, in pursuance of this representation on the part of the defendant, did go over to plaintiff's house, and, with full knowledge of the fact that the warrant held by plaintiff was issued in the name of her deceased husband, and that there had been no administration on his estate, induced the plaintiff to part with said warrant, and agreed that it should be valued at \$50 in the trade; and that the same was so valued in the trade; and that Pike took both warrants, valuing each at \$50, in payment for the horse, the defendant consenting thereto; and that plaintiff and defendant agreed that the horse should belong to both of them equally; and that Pike has since sold at a profit the warrant obtained from plaintiff, and is satisfied with the trade,—then the defendant is estopped from saying that no part of the title to the filly is in the plaintiff, and the latter would have an equal interest with him in the filly; and that if the defendant afterwards took said filly, at the request of plaintiff, to sell and pay her one-half the amount realized from the sale, and, instead of selling her, sold one of his own horses, and worked the filly a week or two in making his own crop, and then swapped her off, taking another horse in exchange for her, then plaintiff would be entitled to recover of defendant one-half the value of the said filly, with interest on the same from the time defendant swapped her off to the present."

This charge, to which the defendant excepted, is now assigned as error.

L. E. PARSONS, and J. FALKNER, for appellant.

BROCK & BARNES, *contra*.

R. W. WALKER, J.—Inasmuch as assumpsit lies only upon a promise, express or implied, and not to recover damages for torts or trespasses, a mere conversion of the goods of the plaintiff, without any sale of them, will not support the action. The doctrine of waiving a tort and bringing assumpsit is confined to cases where the defendant has disposed of the plaintiff's property, and received

either money, or some article or thing as money.—Pike v. Bright, 29 Ala. 336; Crow v. Boyd, 17 *ib.* 51; Strother v. Butler, 17 *ib.* 733. If the property has been sold, it makes no difference whether the price is received in money, or in a chattel at an estimated price, for money. Arms v. Ashley, 4 Pick. 71; Mason v. Waite, 17 Mass. 560; Stewart v. Conner, 9 Ala. 813; Cameron v. Clarke, 11 *ib.* 259.

But there is a material distinction between a sale and an exchange, or a bargain of barter; and where one chattel is exchanged for another, no price being attached, it is not a sale.—Gunter v. Leckey, 30 Ala. 596. The transaction by which the defendant disposed of the filly, was strictly an exchange, not a sale. There is nothing from which we can infer that the defendant received the horse he obtained in exchange as so much money, for it does not appear that the value of either chattel was measured in money terms; nor is the fact, that the defendant paid the plaintiff some \$25 or \$30 on account of her interest in the filly, at all inconsistent with the idea, that he had not sold the property for money, or for anything else which was taken as money.

If it was shown, or could be fairly inferred from the evidence, that the horse substituted for the filly had been sold by the defendant, the plaintiff would, perhaps, be entitled to recover in this suit. But the bill exceptions expressly negatives this, and repels any inference that the horse had been converted into money, by the explicit statement that “the defendant had not received any money for the filly, or the one he swapped for.”

If, therefore, the *gravamen* of the action is the conduct of the defendant, first in working the filly on his farm, and then in exchanging her for a horse, which he appropriated to his own use, there can be no recovery in assumpsit.—Willet v. Willet, 3 Watts, 277; Jones v. Hoar, 5 Pick. 285; 6 Rich. 159.

[2.] If it be said, that the facts supposed in the charge of the court show that there was a contract between the parties, which the defendant has broken, the answer is, that though the plaintiff might recover for such a breach

in assumpsit, she can only do so under a special count alleging the contract and breach. The complaint in this case contains only the common counts, for money had and received, and for goods sold. The rule that the plaintiff cannot recover by proving a cause of action different from that alleged, applies in appeal cases, as well as other suits.—*Smith v. Causey*, 28 Ala. 655–658. Whether the plaintiff's right of recovery be rested on the defendant's conversion of her property, or on the breach of a special contract, is, therefore, immaterial, for neither one of these causes of action was alleged in the complaint.

We are constrained to hold, that the court erred in the charge given.

The judgment must be reversed, and cause remanded.

KELLY vs. CUNNINGHAM.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Admissibility of declarations of sick slave.*—The declarations of a slave whose soundness is in controversy, made to a person who was not a physician, to the effect "that he had the dropsy, that it was an old disease, and had been on him a long time," are not competent evidence.
2. *Damages.*—In an action to recover damages for a breach of warranty of the soundness of a slave, the right to recover the reasonable charges of the physicians who have attended the slave, does not depend on the fact that they have been paid.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. NAT. COOK.

THIS action was brought by Lewis Cunningham, against Christopher Kelly, to recover damages for a breach of warranty of the soundness of a slave, named George, who was sold by defendant to plaintiff in January, 1854. The defendant pleaded, in short by consent—"1st, *non*

assumpsit; 2d, want of consideration in the warranty; and, 3d, failure of consideration in the warranty." On the trial, as appears from the bill of exceptions, the plaintiff introduced one Brown as a witness, who testified, "that he had known the slave George, from 1851, up to the time of his death, in November or December, 1857; that he had frequently seen said slave during that time at church; and that said slave told him, on one occasion, that he had the dropsy, that it was an old disease, and had been on him a long time." It being shown that this witness was not a physician, the defendant moved to exclude from the jury what he had said about the slave's declarations to him; but the court overruled the motion, and the defendant excepted. The plaintiff also introduced as witnesses two practicing physicians, each of whom testified to the performance and value of professional services rendered to the slave while sick, "and that the same had not been paid, but secured by the plaintiff; and this was all the evidence in regard to the payment of said physicians' fees." The defendant asked the court to instruct the jury, that before they could allow the plaintiff anything for physicians' fees, they must be satisfied from the evidence that said fees had been paid before the commencement of this suit"; which charge the court refused to give, and the defendant excepted.

The rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

SMITH & AIKEN, for appellant.

HEFLIN & FORNEY, with WALDEN & BOWIE, *contra*.

A. J. WALKER, C. J.—"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are original evidence. So, also, the representations by a sick person, of the nature, symptoms and effects of the malady under which he is laboring at the time, are received as original evidence."—*Rowland v. Walker*, 18 Ala. 749; *Eckles & Brown v. Bates*, 26 *ib.* 655; *Phillips v. Kelly*, 29 *ib.* 628; *Holloway v. Cotten*, 33 *ib.* 529;

Blackman v. Johnson, 35 *ib.* 252. These declarations are admitted, to the extent indicated, on a principle of necessity, and as a part of the *res gestæ*, whether made to a physician or not, and whether made by a slave or a free person. But the principle does not include declarations which do not describe the feelings of the declarant, or the symptoms and effects of his malady, but which simply declare the existence and past duration of a disease, in the detection and proper denomination of which some degree of skill is necessary. The declarations of the slave, "that he had the dropsy, that it was an old disease, and had been on him a long time", were inadmissible.

[2.] The plaintiff's right to recover the reasonable charges of the physicians who attended upon the diseased slave, did not depend upon the fact of his having paid them.—Garrett & Hill v. Logan, 19 Ala. 344; Miller v. Garrett, 35 *ib.* 96.

The judgment is reversed, and the cause remanded.

BISHOP vs. BLAIR.

[TRESPASS QUARE CLAUSUM FREGIT.]

1. *Error without injury in admission of illegal redundant evidence.*—The admission of evidence, which, though illegal, is simply redundant or superfluous, is, at most, error without injury.
2. *Jurisdiction of probate court to sell real estate.*—The probate court has no jurisdiction to order the sale of lands, for the purpose of division among a decedent's heirs-at-law or devisees, when the decedent had, at the time of his death, no title whatever to the land, either legal or equitable.
3. *When action lies between joint tenants.*—Where there has been no actual ouster, one joint tenant of land cannot maintain an action of trespass against his co-tenant.
4. *Husband's marital rights to wife's realty.*—The husband acquires, by the marriage, the right to use and occupy, during coverture, lands belonging to the wife, whether her title be governed by the "woman's law" or not.

5. *Estoppel by record, and by acts en pais*.—A decree of sale by the probate court, for the purpose of division among heirs or devisees, does not operate an estoppel against a party thereto, when the proceedings are void for want of jurisdiction in the court; nor is the party estopped, at law, from disputing the title of the purchaser, by the fact that he stood by and permitted the sale without objection, afterwards refused to let the purchaser surrender his purchase, received a part of the purchase-money in distribution, and subsequently bought from the purchaser a right of way over the land.
6. *Estoppel against tenant from denying landlord's title*.—An order of the commissioners' court, granting to the defendant a private right of way through the plaintiff's lands, does not estop the defendant, when sued for the commission of a trespass on lands outside the track of the private road, from disputing the plaintiff's title to the land.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JNO. GILL SHORTER.

THIS action was brought by Wesley Bishop, against William Blair, and was commenced in a justice's court. On the trial in the circuit court, as appears from the bill of exceptions, it was shown that the plaintiff and the defendant's wife were children of Mrs. Nancy Bishop, who was the widow and administratrix of William Bishop, deceased; that the land on which the alleged trespass was committed, was entered by Mrs. Bishop, after the death of her said husband, in her own name, but with funds belonging to the estate of her said husband; that it was afterwards sold, under an order of the probate court, on the petition of said administratrix, for the purpose of division among the parties interested under the decedent's will; that it was bought at the sale by the plaintiff, who afterwards paid the purchase-money, and received a deed from the administrator *de bonis non*; that the defendant was present at the sale, made no objection to it, refused to let the plaintiff relinquish his bid, and afterwards received from the administrator *de bonis non*, in right of his wife, a distributive share of the purchase-money paid by the plaintiff; that after the plaintiff had entered into the possession of the land under his purchase, the defendant instituted proceedings before the commissioners' court

of the county, and obtained a decree establishing for himself a private right of way through the said land; that he paid the damages assessed by the jury, and opened the road; and that he afterwards entered on the plaintiff's land, and cut up and carried off, after being warned by the plaintiff to desist from doing so, "a fallen timber tree which lay entirely outside the said road."

"The evidence above recited was introduced in the following order: The plaintiff first proved, that Mrs. Nancy Bishop entered the land in her own name, but with funds belonging to the estate of her deceased husband; then introduced the petition to the probate court, the order of sale, and the administrator's deed to the plaintiff, to prove title to the land; and then the record of the commissioners' court, showing the grant of a private road to the defendant, and the evidence tending to show the acts of the defendant in cutting up and removing the tree. The defendant then offered in evidence the deposition of Thomas O. Glasscock, the register of the land-office at Montgomery, for the purpose of showing an outstanding title, in connection with proof that defendant's wife was one of the children and heirs-at-law of Mrs. Nancy Bishop, who was shown by the testimony of said Glasscock to have entered the land. In rebuttal, the plaintiff read in evidence the will of William Bishop, deceased, and a deed of relinquishment by Mrs. Nancy Bishop to her children, and proved the manner and circumstances of the sale at which he had bid off the land; and it was admitted, that one of the children and heirs of Mrs. Nancy Bishop then was, and still is, a minor. The plaintiff then offered to prove, that Mrs. Bishop, executrix, after the death of her said husband, bought three negroes and some land, besides the forty-acre tract here in controversy, with the funds of said estate; that the land was sold in the same manner, and the defendant bid for one of the tracts; that the negroes were divided among the heirs, and that the defendant, in right of his wife, received one of them on said division. This evidence the court excluded, on the defendant's motion, as illegal and irrelevant; to which the plaintiff excepted."

The deposition of Glasscock was taken on interrogatories and cross interrogatories. He was asked to state, who entered at the land-office in Montgomery the tract of land here in controversy, and to whom a certificate or patent was issued; and to give copies of all entries in said land-office relating to the same. To each of these questions the plaintiff objected, when crossing the interrogatories, on the ground that they called for secondary and illegal evidence; and he renewed his objections when the deposition was offered on the trial. The court overruled the objections, and the plaintiff excepted.

“Upon the facts above recited, the plaintiff asked the court to instruct the jury—

“1. That if the defendant stood by, and witnessed the sale, and, after the land was bid off by plaintiff, objected to plaintiff's giving up the land, and afterwards accepted a part of the proceeds of sale in respect of his wife's interest in the land,—then the law presumes that the crier who sold the land was the agent of the defendant in that respect, and, in crying the land at the sale, and in knocking it down to the plaintiff, acted under the defendant's authority, and the defendant was bound by his act.

“2. That if the administrator, after a sale effected as supposed in the foregoing charge, with the knowledge and consent of the defendant, made and delivered to the plaintiff a deed to the land on which was the *locus in quo*; and if said deed was given in good faith, and accepted as passing title; and if the plaintiff, at the time of the trespass, held actual possession under said deed of a part of the land therein mentioned; and if the *locus in quo* was on the said land, and on the same forty-acre tract with the part so in actual possession, and defendant knew it when he committed the trespass complained of,—then plaintiff may well maintain this action.

“3. That if the plaintiff acquired the equitable title to the *locus in quo*, by the sale, partition of the proceeds, and other facts proved; and if the administrator's said deed covered the *locus in quo*, and was given and accepted in good faith as conveying title; and if the plaintiff entered under *bona-fide* color of title, and the defendant knew of

said deed, and that it covered the *locus in quo*; and if the plaintiff, at the committing of the tort in question, was in actual possession under said sale and deed of a part of the land covered by the deed; and if the *locus in quo* and the part so in plaintiff's actual possession were adjacent, and on the same forty-acre tract,—then the plaintiff had such title as enabled him to maintain trespass; and, if he has proved that defendant, against his remonstrance, cut up, carried away, and converted to his own use the body of the fallen tree, and said fallen tree was not obstructing defendant's road, and, before falling, did not stand in the road, then plaintiff must recover the damages proved.

“4. That if they believed from the evidence that Mrs. Nancy Bishop, the executrix, entered the land with the money of her testator's estate, and took the title to herself, and afterwards released all her estate and interest in the land to the heirs of the estate; and that an application was made by her, as executrix, to sell said lands for division, as part of her testator's estate; and that the defendant and the other heirs were parties to said proceedings in the probate court, and agreed and consented to said sale; and that defendant was present at the sale, consented thereto, refused to let plaintiff off from his purchase of said land at the sale, and received his part of the purchase-money for said land,—then, although the order of sale was void as a judicial proceeding, the title of the defendant passed by the sale to the plaintiff; and, if the defendant converted the tree to his own use, and not for the purpose of removing it as an obstruction to his road, he was a trespasser, and liable to the plaintiff.

“The court refused each of these charges, and instructed the jury, that one of the heirs, being a minor, could not be estopped by the facts proved from denying plaintiff's title; and that the minor not being estopped, the defendant and his co-heirs are not estopped.”

The plaintiff excepted to the charge given, and to the refusal of the several charges asked; and he now assigns the same as error, together with the rulings of the court on the evidence.

JEFF. BUFORD, for appellant.

PUGH & BULLOCK, with S. F. RICE, *contra*.

STONE, J.—We deem it unnecessary to announce any opinion on the various rulings of the circuit court, in reference to the deposition of Mr. Glasscock. The whole purpose and effect of that deposition was to prove a single fact—namely, that Mrs. Nancy Bishop had, herself, and in her own name, purchased from the government the land on which the alleged trespass was committed. This fact had been proved by the plaintiff, before the deposition of Mr. Glasscock was offered by the defendant. The bill of exceptions states the order in which the evidence was adduced. The language is, “The plaintiff first proved that Nancy Bishop entered the land with funds of the estate, and in her own name.” The testimony, then, tending, as it did, only to prove a fact which had been previously proved by the plaintiff, could not have injured the plaintiff.—Shep. Dig. 568, § 90.

[2.] The legal title to the land was first in Mrs. Bishop. William Bishop, her husband and the testator, had, at the time of his death, no claim to the land, either legal or equitable. It was purchased from the government after his death. This being the case, the probate court had no jurisdiction to order its sale, under a petition which alleged that it was of the estate of the said William Bishop. *Pettit v. Pettit*, 32 Ala. 288; *Cothran v. McCoy*, 33 *ib.* 65; *Johnson v. Collins*, 12 *ib.* 322; *McCain v. McCain*, *ib.* 510.

[3.] The title to the land having been in Mrs. Bishop, it passed to her heirs-at-law, either by her deed copied in the record, or by descent on her death. The plaintiff, Wesley Bishop, and Mrs. Blair, the wife of defendant, are two of the children and heirs-at-law of Mrs. Nancy Bishop. They each took, as joint tenants, an interest in the land in controversy. This being the case, if their title remains as it was at her death, neither can maintain the action of trespass against the other, because there has been no actual ouster.—1 Chit. Pl. 79.

[4.] Mrs. Blair, being joint tenant with her brother, Wesley Bishop, it is clear, whether her title be governed

by the woman's law or not, that her husband, Mr. Blair, acquired by his marriage the right to use and occupy her lands during the coverture.—Code, § 1983; Cheek v. Waldrum, 25 Ala. 152; Neill v. Johnson, 11 *ib.* 615.

[5.] It is contended for appellant, that Mr. Blair is estopped from disputing the title of Wesley Bishop—1st, by the decree of sale in the probate court, to the record of which he and his wife were parties; 2d, by standing by and permitting the sale, by refusing to let Wesley Bishop surrender his purchase, by receiving a part of the purchase-money in distribution, and by paying Wesley Bishop for a right of way over said land. The authorities cited above show, that the proceedings of the probate court were void, and hence there is nothing in this first objection. We will not now decide whether the acts *en pais* do not amount to an estoppel. If, however, they do, such estoppel can only be invoked in equity, and does not confer on Mr. Bishop any higher legal title than he at first owned.—See McPherson v. Walters, 16 Ala. 714; Smith v. Mundy, 18 *ib.* 182; Hopper v. McWhorter, *ib.* 229.

[6.] We need not inquire, whether the order granting the private road was void; or, if void, whether that fact would clothe the landlord with the immunity with which landlords are usually clothed—namely, the right to hold their tenants estopped from disputing the title under which they entered.—See Sadler v. Langham, 34 Ala. 311; and Crommelin v. Thiess, 31 Ala. 412. Such estoppel, if it apply, can only be co-extensive with the possession received. In this case, Mr. Blair received only a right of way; and, under the order of the court of county commissioners, his possession was limited to the mere road track, and there only as an easement, or right of way. It gave him no right to anything outside, or to occupy the land beyond the track of the road. In fact, we do not understand the appellant as controverting this proposition. His right to maintain this suit depends on his ability to maintain the proposition, that Mr. Blair's right of way did not confer on him the right to remove the timber tree. The bill of exceptions informs us, that the trunk of the tree, which was removed by Mr. Blair, lay outside of the

road-track. The *gravamen* of the present action is for breaking and entering the plaintiff's close. Conceding the validity of the order under which Mr. Blair acquired the right of way from Mr. Bishop, the argument is, that the former, entering under the latter, is estopped from disputing his paramount right. However weighty this argument might be, if the trespass complained of had been committed within the boundaries of the road-track, we are satisfied it can exert no influence beyond those boundaries. The trespass, if one was committed, was on plaintiff's close, outside of the road-track. As to this, Mr. Blair did not hold under Mr. Bishop, and he is, consequently, not estopped from disputing his title.

The charges asked and refused are in conflict with these views, and the court did not err in refusing to give them. The affirmative charge given could not possibly affect the plaintiff prejudicially.

Judgment of the circuit court affirmed.

STRIPLIN vs. WARE.

[BILL IN EQUITY FOR REMOVAL OF MOTHER FROM GUARDIANSHIP OF INFANT CHILDREN.]

1. *Mother's right, as guardian, to custody of infant children.*—Under the statutes of this State, (Code, §§ 2014–15,) as at common law, the mother is entitled, on the death of the father, to the custody of infant children under fourteen years of age; but this right is not beyond the control of courts of justice.
2. *Removal of mother from custody of infant children.*—The chancery court will remove infant children from the custody of their father or mother, whenever it is clearly shown that their morals, safety or interests require their removal; but this jurisdiction is one of extreme delicacy, and will only be exercised in cases of gross misconduct on the part of the parent, or inability from some cause to furnish proper nurture and training for the child: the fact that the second husband of the mother, who shares with her the care and

management of her infant children, is not a man of unexceptionable morals, and is addicted to profanity, even in the presence of his family, is not sufficient cause for the removal of the children from the custody of the mother, against her wishes, when it is shown that they are treated kindly, are well fed, well clothed, and sent to school; that no charge is made for their board or lodging, and that they are of such tender years as to require their mother's constant watchfulness and care.

APPEAL from the Circuit Court of Randolph.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by William M. Striplin, Samuel A. Striplin, and Georgiana Striplin, infants suing by their next friend, against their mother, Mrs. Secluda A. Ware, and her present husband, William J. Ware; and sought to have Mrs. Ware removed from the guardianship of the persons and estates of the complainants, and deprived of their custody and control. Each of the defendants answered, and denied all the material allegations of the bill. On final hearing, on pleadings and proof, the chancellor dismissed the bill, at the costs of the complainants' next friend; and his decree is now assigned as error.

JOHN T. HEFLIN, for appellants.

JAS. B. MARTIN, *contra*.

R. W. WALKER, J.—Sections 2014 and 2015 of the Code are in the following words: “§ 2014. When a minor has a father living, and has an estate in his own right, a guardian must be appointed for him; and his father, if a suitable and proper person, and willing to give bond and qualify as guardian, is entitled to a preference. No such guardian can exercise any control over the person of his ward, during the life of the father; or during the life of the mother, if the ward is a female, or a male under the age of fourteen years.” “§ 2015. Guardians may be appointed by the last will and testament of the father, if the right is claimed within six months after the will is admitted to probate. Such guardian must give bond with surety, as

other guardians appointed in the usual mode; but the mother is entitled to the custody of the person of the ward, until it is fourteen years of age."

In the present case, the children, whose custody is the subject of controversy, are all under the age of fourteen years, and their father is dead. It is clear, therefore, that the sections just quoted confer the right to the custody of their persons upon their mother. This provision of our statute is in harmony with the common law, which wisely declares that, upon the death of the father, the mother becomes the guardian, by nature and nurture, of her infant children.—2 Kent's Com. 205, 220; 4 Johns. Ch. 80; McPherson on Inf. 66, 72; People v. Wilcox, 22 Barb. 184; 3 Lead. Cases Eq. 263-4.

But this right of the mother, whether arising under the statute, or under the common law, is not so absolute as to be beyond the control of courts of justice. The law devolves the custody of infant children upon their parents, not so much upon the ground of natural right in the latter, as because the interests of the children, and the good of the public, will, as a general rule, be thereby promoted. It is a fair presumption, that so long as children are under the control of their parents, they will be treated with affection, and their education and morals will be duly cared for. When, however, this presumption is removed, and the morals, safety, or interests of the children, strongly require their withdrawal from the custody of the father or mother, the court of chancery (which is the general guardian and protector of all infants within its jurisdiction) will interfere, and place the care and custody of them elsewhere.—2 Kent, 205, 220-7; 2 Story's Eq. § 1340; Wellesley v. Wellesley, 2 Bligh, 128-30; De Manneville v. De Manneville, 10 Vesey, jr. 63, &c.; 3 Lead. Cases Eq. (edit. 1859) 270.

Although this jurisdiction is firmly established, and seems indispensable to the morals, the good order, and the just protection of civilized society, it is admitted to be one of extreme delicacy, and of no inconsiderable embarrassment and responsibility.—2 Story's Eq. § 1340. So strong is the presumption, that "the care which is

prompted by the parental instinct, and responded to by filial affection, is most valuable of all"; and so great is the reluctance of the court to separate a child of tender years from those who, according to the ordinary laws of human nature, must feel the greatest affection for it, and take the deepest interest in its welfare,—that the parental authority will not be interfered with, except in case of gross misconduct, or where, from some other cause, the parent wants either the capacity or the means for the proper nurture and training of the child. Where a contest for the custody of a child arises between its father or mother and a third person, the superior claim of the parent ought not, in our opinion, to be disturbed, unless it plainly appears that the interests of the child require it to be set aside.—See 2 Story's Eq. § 1340; *People v. Mercen*, 25 Wend. 73; S. C., 8 Paige, 47; *People v. Wilcox*, 22 Barb. 178, (184); *Ball v. Ball*, 2 Simons, 35; 3 Lead. Cases Eq. 277. Whenever it is shown that the parent is guilty of gross ill-treatment or cruelty towards his infant children, or that his conduct or domestic associations are such that the children cannot associate with him without moral contamination, it is the duty of the court to interfere for their protection, and to appoint a suitable person to take care of them and superintend their education. 2 Story's Eq. § 1340; *Anonymous*, 2 Simons, N. S. 54.

The evidence in this case is wholly insufficient to show that the mother is, either physically or mentally, incapable of taking proper care of these children. The main ground on which the application seems to be rested, is the conduct and character of the mother's present husband, with whom she is now living, and who shares with her the care and management of these children. It is plain, we think, that nearly the whole of the testimony by which it is sought to establish those allegations of the bill which impeach the conduct and character of Wm. J. Ware, should be received with many grains of allowance. Most of the witnesses who testify to any very material facts in support of these allegations, hold unfriendly relations to Ware; and it is easy to see that their evidence is influenced, to some extent, (perhaps unconsciously,) by

prejudice or animosity. Still, it is obvious that the mother of these children is the wife of a man whose morals are, to use the mildest expression, somewhat exceptionable. He is much given to profanity; and it is a fair inference from the evidence, that he does not restrain himself, in this respect, in the presence of his wife and children. Some of the testimony tends to show, (though it is not, in our opinion, conclusive,) that at one time Ware was guilty of adulterous intercourse with slaves. The circumstances were, at least, so suspicious as to arouse the jealousy of Mrs. Ware, and create for a while great domestic disturbance between the husband and wife. It is shown, however, that if this adulterous intercourse ever in fact existed, it has ceased—the wife has become satisfied that the charge was untrue—the domestic peace has been restored, and the parties are living together in harmony.

The testimony of those of Ware's neighbors who are most intimate with his family, and visit his house most frequently, convinces us that he treats these children with kindness. There is no reason to apprehend, that, if they are permitted to remain where they now are, they will be in danger of being personally abused. They are well fed, well clothed, and sent to school; and no charge is made for their board or lodging. All the children are of tender years, and stand in need of that ever watchful care which none but a mother is likely to bestow, and for which it is next to impossible to find a substitute. The mother manifests a strong and very natural solicitude that she should not be deprived of the control and nurture of her children; and it is safe to presume, as a general rule, that a mother (the father being dead) would be more careful of the moral, intellectual and physical well-being of her children, than any other person in the world. If these children should now be separated from their mother, and placed under the charge of some third person, it is altogether likely that they would grow up comparative strangers to her, and her maternal attachment to them and their filial affection for her would, as a natural consequence, be materially weakened,—a result which could

not add to the happiness of either mother or children. While we admit the probability that a home, in some respects more suitable than the house of their step-father, could be provided for the children, we concur with the chancellor in thinking, that the absence of a mother's watchfulness and love would more than counterbalance any advantages arising from the change.

Decree affirmed.

SIMMONS vs. VARNUM.

[SUMMARY PROCEEDING FOR CONTRIBUTION BETWEEN CO-SURETIES.]

1. *Amount of recovery for contribution.*—In a summary proceeding for contribution between co-sureties, (Code, § 2645,) a recovery can only be had for the defendant's aliquot proportion of the debt, although he may have been fully indemnified by the principal; consequently, evidence of such indemnity is irrelevant.
2. *Amendment of notice.*—A defendant in a summary proceeding, having been brought into court by the service of a legal notice, cannot object on error to the allowance of an improper amendment of the notice, unless he reserved the point by bill of exceptions at the time of the allowance of the amendment.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JNO. GILL SHORTER.

THIS was a summary proceeding, by notice and motion, by James Varnum, against Holman F. Simmons; and was commenced in October, 1856. The original notice alleged, that the plaintiff and one Felix Simmons, as sureties for the defendant, executed a promissory note for \$300, payable to W. R. Baird or order; that a judgment was afterwards recovered on this note, against the plaintiff alone, for the amount of the note and interest, which judgment he had paid; and claimed a recovery for the

entire amount so paid, with interest thereon. At the May term, 1858, an order was made in the cause, in these words: "The parties came, by attorney, and plaintiff amended his notice, so as to proceed against defendant as co-surety." At the trial term, in December, 1858, as appears from the bill of exceptions, when the cause was called, and the plaintiff had announced himself ready, "it was suggested to the court, by an attorney acting as *amicus curiæ*, that the defendant had had no notice of the motion then on the docket." The plaintiff thereupon read to the court the original notice, with the minute entry of the preceding May term, "and proved to the court, that at said May term, 1858, when plaintiff moved to amend his motion, defendant was present in open court, and appeared by his attorney, and resisted said motion to amend; that his objections were overruled, and the plaintiff's motion granted, as shown by the said entry. The court thereupon decided, that, inasmuch as the defendant had appeared at the last term, and resisted the motion to amend, the notice of the present amended proceeding against him as co-surety was sufficient; to which ruling of the court the defendant excepted."

The plaintiff then introduced as a witness W. R. Baird, the plaintiff in the judgment paid by him, who testified to the amount and payment of the judgment by the plaintiff; and to the fact that plaintiff and defendant were sureties for Felix Simmons on the note which was the foundation of the judgment; and was then allowed by the court, against the defendant's objection, to testify to a conversation between himself and the defendant, subsequent to the rendition of said judgment, in which the defendant admitted that he had received full indemnity against the debt from Felix Simmons, and promised to pay it if witness would hold up the execution against plaintiff; to the admission of which evidence the defendant reserved an exception. The court charged the jury, "that if they believed from the evidence that the defendant had been indemnified by Felix Simmons against the debt on which he and plaintiff were sureties, and had received from said Felix Simmons a sufficient amount to

cover the whole of said debt and interest, then plaintiff would be entitled to recover from defendant the entire amount paid on said judgment, with interest from the time of payment." To this charge the defendant also excepted.

The rulings of the court to which, as above stated, exceptions were reserved, are the matters now assigned as error.

L. E. PARSONS, for appellant.

JAS. B. MARTIN, *contra*.

A. J. WALKER, C. J.—In a summary proceeding by a surety, against his co-surety, under the first subdivision of section 2645 of the Code, a recovery for more than the defendant's aliquot part of the debt, after excluding the portion of insolvent sureties, can not be had; and evidence that the defendant was indemnified, adduced for the purpose of procuring a judgment for a larger amount, is irrelevant.

[2.] Where a defendant has been served with the legal notice of a proceeding in the circuit court against him, it is not necessary that he should have notice of any subsequent amendment of the pleadings. He is brought into court by the service of the notice, which commences the suit, and is bound afterwards to take notice of all the proceedings in the cause. If an improper amendment is made, the injured party should object at the time, and bring up the question for revision by bill of exceptions.

Judgment reversed, and cause remanded.

GUILFORD *vs.* HICKS.

[PETITION FOR HABEAS CORPUS ON BEHALF OF PERSON HELD AS SLAVE.]

1. *When appeal lies.*—An appeal does not lie to the supreme court, from the decision of a probate judge on a petition for *habeas corpus*. Code, §§ 3016, 3710–47.
2. *Presumption in favor of ruling of primary court.*—In a case which was tried before a probate judge without the intervention of a jury, the appellate court will presume, unless the contrary is affirmatively shown, that his decision was justified by the evidence.
3. *When right to freedom may be tried on habeas corpus.*—Although a negro, or person of color, if held as a slave, cannot test his right to freedom by petition for *habeas corpus*; yet, when a white person is held as a slave, a petition for *habeas corpus* may be sued out in his behalf.

APPEAL from the Probate Court of Henry.

IN this case, Mrs. Cassy Ann Hicks filed her petition in the office of the probate judge of said county, on the 9th August, 1859, alleging that her daughter, Patience L. Hicks, and her grand-daughter, Cassy Ann S. Hicks, the daughter of said Patience L. Hicks, (both being infants under the age of twenty-one years,) were illegally restrained of their liberty, and held as slaves, by John Guilford; and praying that the writ of *habeas corpus* might issue, to inquire into the cause of such illegal detention. Notice of this application having been served on Guilford, he appeared, and filed an answer, alleging that he held said Patience L. and her child as slaves under a purchase from one James C. Wilson. To this answer the petitioner filed “an answer”, denying that the said Patience L. and her child were slaves. To this “answer” Guilford demurred, “because the same is not a denial of the facts set forth in his answer to the writ.” The probate judge overruled the demurrer, and Guilford excepted to his decision. Guilford also moved to dismiss the whole proceeding, because the petition showed that he held and

claimed said Patience L. and her child as slaves, and reserved an exception to the overruling of his motion.

On the trial before the probate judge, as appears from the bill of exceptions, the petitioner adduced evidence showing that said Patience L. Hicks was her child, was a free white person, and was decoyed from her house, under promises of marriage, by said James C. Wilson; while the respondent offered testimony tending to show that said Patience was a person of color and a slave, and had belonged to one Jones, in Florida, from whom she was purchased by Wilson. "Upon the testimony, it was ordered by the court, that Patience L. Hicks and Cassy Ann S. Hicks be discharged from the service of the said John Guilford, and restored to the petitioner, and that John Guilford pay the costs; to which the said John Guilford excepted."

The rulings of the probate judge to which, as above stated, exceptions were reserved, are now assigned as error.

WATTS, JUDGE & JACKSON, for appellant.

MARTIN, BALDWIN & SAYRE, *contra*.

STONE, J.—The trial of this case was had before Geo. W. Williams, judge of probate for Henry county, and not before the probate court of that county.—Code, §§ 3710, *et seq.*; *Ex parte Bennett*, 30 Ala. 461. Hence, the judgment of that tribunal can not be brought before this court for review, by appeal.—Code, § 3016.

[2.] Conceding, however, that the case is before us on a proper motion, let us inquire whether the applicant is entitled to any relief. The petition avers, that Patience L. Hicks and her child are free white persons. The bill of exceptions, sealed on the trial, sets out certain evidence as given in, but does not affirm that it contains all the evidence. The judge of probate, after hearing the evidence, decided, in terms most emphatic, that Patience L. Hicks and her infant child, Cassy Ann, are free white persons. Under a well settled rule, we are unable to affirm that he decided incorrectly, in the absence of in-

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formation that the record contains all the evidence on which he pronounced his decision. On the contrary, we are bound to indulge the presumption, that his decision was justified by the evidence.—Shep. Dig. 572, § 145; Stewart v. Hargrove, 23 Ala. 420; Donnell v. Jones, 17 *ib.* 689; Glass v. Glass, 24 *ib.* 468; Price v. Gillespie, 28 *ib.* 279; Shep. Dig. 567, § 78; School Comm. v. Godwin, 30 *ib.* 242.

[3.] The parties who were restrained of their liberty being white persons, they could not, under our law, be slaves. Nor could any question arise as to another's right of property in them, for the obvious reason, that no person can have property in a white person. In Field v. Walker, (17 Ala. 80,) it was correctly asserted, that persons of color could not try their right to freedom on *habeas corpus*. But that principle has no application to this case. Nor does section 2049 of the Code make any provision for such a case as this. That section, by erroneously employing the word *slave*, evidently means *negro*, or *person of color*. These parties, if white persons, could not possibly bring themselves within the provisions of that section.

Appeal dismissed.

YOUNG vs. KINNEBREW.

[CREDITOR'S BILL TO SUBJECT SEPARATE ESTATE OF MARRIED WOMAN TO PAYMENT OF CHARGE CREATED DURING COVERTURE.]

1. *Construction of deed of gift to trustee, for sole use and benefit of married woman "and heirs of her body."*—A deed of gift, by which slaves are conveyed to a trustee, "for the sole and separate use and benefit, and for the support and maintenance", of a married woman "and the heirs of her body, free from and uncontrolled by her said husband, and to be in no manner subject to or liable for his debts," confers upon her the absolute and equitable interest in the slaves, and gives her children no estate whatever, either jointly with her, or as remainder-men.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Edwin H. Kinnebrew, on the 14th July, 1857, against Mrs. Dorothea C. Sledge, her husband, Edmund A. Sledge, and her trustees, Bolling Young and William W. Ross; and sought to subject to the satisfaction of two promissory notes, executed to the complainant by Mrs. Sledge, certain slaves held by her trustees under the deeds hereinafter more particularly described. One of the notes held by the complainant was dated the 17th February, 1855, and payable on or before the 25th December next after date; the other was dated the 23d February, 1856, and payable on or before the 25th December next after date; and the bill alleged, that both of these notes were executed by Mrs. Sledge, during coverture, for debts contracted by her for the support and maintenance of herself and children. Of the slaves sought to be condemned by the bill, some were conveyed by Bernard Young, the father of Mrs. Sledge, to Bolling Young as trustee, by deed of gift dated the 18th March, 1841; and the others were conveyed by said Bolling Young, to William W. Ross as trustee, by deed of gift dated the 5th April, 1851; of which two deeds the following are copies:

“State of Alabama, } Know all men by these presents,
Montgomery county. } that I, Bernard Young, of the
county and State aforesaid, for and in consideration of the
natural love and affection which I have and bear for
and towards my daughter, Dorothea C. Sledge, wife of
Edmund A. Sledge, of the said county and State, and
also for and in consideration of the sum of one dollar to
me in hand paid by Bolling Young, of the aforesaid county
and State, at and before the sealing and delivery of these
presents, the receipt whereof is hereby acknowledged,—
I, the said Bernard Young, do hereby bargain, sell and
convey unto the said Bolling Young, as trustee for the said
Dorothea C. Sledge and the heirs of her body, the following
described slaves, to-wit”, &c., (describing them;) “to have
and to hold the said slaves unto the said Bolling Young,

his executors and administrators, forever; in trust, nevertheless, and for the purposes hereinafter named—that is to say, that the aforesaid slaves, and the future increase of the female part thereof, shall be held by the said Bolling Young, as trustee as aforesaid, for the sole and separate use and benefit, and for the support and maintenance, of the said Dorothea C. Sledge and the heirs of her body, free from and uncontrolled by her said husband, Edmund A. Sledge, and to be in no manner subject to or liable for the debts of the said Edmund A. Sledge, which have been already, or may be hereafter created by him; but shall be enjoyed and held, as a separate estate of the said Dorothea C. Sledge and the heirs of her body, by and through her trustee aforesaid, for her sole use and benefit, and for her separate support and maintenance, and that of the heirs of her body. In testimony whereof,” &c.

“State of Alabama, } Know all men by these presents,
Montgomery county. } that I, Bolling Young, of the
county and State aforesaid, for and in consideration of the
natural love and affection which I have and bear to and
for my sister, Dorothea C. Sledge, wife of Edmund A.
Sledge, and also for and in consideration of the sum of
one dollar to me in hand paid by¹ William W. Ross, of
said county and State, at and before the sealing and
delivery of these presents, the receipt whereof is hereby
acknowledged,—I, the said Bolling Young, do hereby
give, bargain, sell and convey unto the said William W.
Ross, as trustee for the said Dorothea C. Sledge and the
heirs of her body, the following described slaves”, &c.
(describing them;) “to have and to hold the said slaves to
the said William W. Ross, his executors and administrators,
forever; in trust nevertheless, and to and for the purposes
hereinafter named—that is to say, the said slaves,
and the future increase of the female part thereof, shall
be held and possessed by the said William W. Ross, as
trustee as aforesaid, for the sole and separate use, and for
the support and maintenance, of the said Dorothea C.
Sledge and the heirs of her body, free from and uncontrolled
by her said husband, Edmund A. Sledge, and to be
in no manner liable for or subject to any debts which have

been already, or may be hereafter contracted by the said Edmund A. Sledge; but shall be, and are hereby intended to be, a separate and distinct estate of the said Dorothea C. Sledge and the heirs of her body, by and through the trustee aforesaid, for her sole and separate use, benefit and support, and that of the heirs of her body. In testimony whereof," &c.

Bolling Young filed an answer, (which was also adopted by Mrs. Sledge,) in which he admitted the execution of the notes held by the complainant, but denied that their consideration was truly stated in the bill, and averred that Mrs. Sledge was induced to sign them by fraudulent representations on the part of the complainant; admitted the execution of the deeds as alleged, but insisted that Mrs. Sledge did not take such an interest in the property as could be subjected to the satisfaction of the complainant's demands; and demurred to the bill—1st, because the children of Mrs. Sledge were not made co-defendants with her; 2d, because the bill did not aver that the profits of the slaves amounted to more than a support and maintenance for Mrs. Sledge and her children; 3d, because the bill showed on its face that the complainant was not entitled to the relief sought by it; and, 4th, for want of equity. The answer was prayed to be taken as a cross-bill for discovery as to the consideration of the notes; and in his answer thereto the complainant reiterated the allegations of the bill. A decree *pro confesso* was entered against Edmund A. Sledge, and it appears that William W. Ross was dead when the bill was filed.

On final hearing, on bill, answers, and exhibits, the chancellor overruled the demurrers, and rendered a decree for the complainant; holding that Mrs. Sledge took the absolute interest in the property, and that the notes were a charge on it; and ordering a reference of the matters of account to the master, and a sale of the slaves in the event that the complainant's debt was not paid by a specified day. The overruling of the demurrers, and the final decree rendered, are now assigned as error.

WATTS, JUDGE & JACKSON, for appellants.—1. It is con-

ceded that "heirs of the body", when used without qualifying, or explanatory words, import an indefinite failure of issue, and are words of limitation; but, if there is any expression in the deed which shows that they were used by the donor as synonymous with children or grandchildren, that intention will be upheld, and the interest of the children or grand-children protected.—*Fellows, Wadsworth & Co. v. Tann*, 9 Ala. 999; *Woodley v. Findlay*, 9 *ib.* 716; *Powell v. Glenn*, 21 *ib.* 466; *Isbell v. Macclin*, 24 *ib.* 320. The case of *Standifer v. Ewing*, 18 *ib.* 400, is not in conflict with this principle, but recognizes it to the fullest extent:—there was nothing in that case indicative of an intention to use the words in any other than their technical sense. The grammatical construction of the deeds in this case shows, that the donor intended the slaves for the support and maintenance of Dorothea C. Sledge (then a married woman with children) and her children. The slaves were to be *enjoyed and held* as the property of her and her children, by and through the trustee, for the support and maintenance of her and her children. The persons meant by "heirs of the body", were as much the present objects of the donor's bounty, as the daughter herself: they were to have the same sort of enjoyment of the property, the same sort of support and maintenance, by and through the trustee, and at the same time; and the same terms which give the daughter an interest, enjoyment, use, support and maintenance, at the same time, and to the same extent, give an interest, enjoyment, use, support and maintenance to the persons designated as "heirs of her body". The case of *Powell v. Glenn*, *supra*, is strikingly like this.—See, also, *Shepherd v. Nabors*, 6 Ala. 631; *Dunn v. Bank of Mobile*, 2 *ib.* 152.

2. If the children of Mrs. Sledge take jointly with their mother under the deed, and the property is held for the joint support and maintenance of them and their mother, it cannot be subjected to the payment of the mother's debts, either at law or in equity.—*Hill and Wife v. McRae*, 27 Ala. 181, and authorities there cited.

3. If the children of Mrs. Sledge do not take jointly

with their mother during her life, they take as purchasers under the deed at her death; in which event, they were necessary parties to the bill.

WM. P. CHILTON, *contra*.—1. As a general rule, a person cannot hold a valuable beneficial interest in property, which cannot be subjected, either at law or in equity, to the payment of his debts.—*Rugely & Harrison v. Robinson*, 10 Ala. 731. The intervention of a trustee does not protect the property, since equity considers the *cestui que trust* as the real owner, and the trustee as a mere man of straw.—*Lamb v. Wragg & Stewart*, 8 Porter, 82.

2. The children of Mrs. Sledge take no interest under the deed. "Heirs of the body" are a strictly technical expression, and are primarily regarded as words of limitation, not of purchase.—*Lewis on Perpetuities*, 348; *Ewing v. Standifer*, 18 *ib.* 400; *Machem v. Machem*, 15 *ib.* 373; *Lenoir v. Rainey*, 15 *ib.* 667; *Darden v. Burns*, 6 *ib.* 365; *Doe v. Appling*, 4 Term R. 82; 1 East, 229; *Keyes on Chattels*, § 250. The deed contains no expression qualifying the technical term. There is no limitation of the use to particular heirs living at any specified time—no period fixed short of an indefinite failure of issue; and the rule against perpetuities is the same in equity as at law. Suppose Mrs. Sledge should die, leaving only great-grand children; would they take as purchasers? Or suppose she should leave one child, ten grand-children, and twenty great grand-children; would they all take as purchasers? and if so, would they take each an equal interest as tenants in common, *per capita*, or *per stirpes*? The fact that the children, though living at the time the deed was executed, are not named in it, is a strong circumstance to show that the word *heirs* was used in its technical sense.

3. There is nothing in the expression, "for her support and maintenance", which can prevent a court of equity from selling the property. Such effect has been allowed to the words, where the property was given to the wife, without other words of exclusion of the husband's rights; and not in cases where the attempt was to subject the

wife's interest.—*Rugely & Harrison v. Robinson, supra*; *Spear v. Walkley*, 10 Ala. 328; *Jasper v. Howard*, 12 *ib.* 652. The case of *Hill v. McRae*, (27 Ala. 181,) relied on by the appellant's counsel, is very unlike the case at bar. There, the trustee was to retain the possession of the property, and apply a portion of the profits to the reasonable support of the beneficiaries; here, the property itself is given.

R. W. WALKER, J.—The estate created by these deeds is a trust estate. But the trust is executed, not executory; and in cases of executed trusts, a court of equity will construe the limitations in the same manner as similar legal limitations.—*Marquis of Cholmondely v. Clinton*, 2 Jac. & W. 148; *Wright v. Pearson*, 1 Eden, 119; *Jones v. Morgan*, 1 Brown's Ch. 206; *Lenoir v. Raney*, 15 Ala. 667; 1 *White & Tudor's Lead. C. Eq.* 28. Accordingly, a trust for A. and the heirs of his body will give A. an equitable estate-tail, if the subject be realty, or the absolute title if it be personalty.—*Williams' Real Property*, 136. For these words, "heirs of his body", have always been held words of limitation, and not of purchase—that is to say, they mark out, or measure the estate of the first taker. Hence, a gift to A. and the heirs of his body is a gift to A. so long as he has such heirs. The heir, if he should take any interest, must take as heir by descent from his ancestor; for he is not constituted by the words of the gift the purchaser or donee of any separate and independent estate for himself.—*Williams' Real Pr.* 78, 215. *Purchase*, in its legal sense, is "possession to which a man cometh not by title of descent."

It is plain, then, that these deeds vested in Mrs. Sledge the absolute equitable estate, unless there is something in the context which shows that the words "heirs of her body", as employed by the donors, are words of purchase, and not of limitation. For, though primarily regarded as words of limitation, they may, by the use of other expressions in the instrument, be shown to be words of purchase. Such a departure from the ordinary construction of the words will be made whenever, upon an exam-

ination of the whole instrument, it is plain that the donor intended that the estate of the first taker should cease with his life, and that the property should upon his death vest in the persons who should at *that time* answer the description of heirs of his body.—Williams v. Allen, 17 Geo. 82; Powell v. Glenn, 21 Ala. 459, 467; Jesson v. Wright, 2 Bligh, 1, 53–57; 2 Wms. Ex'rs, 926. As stated by Lord Hardwicke, “the reason why the words ‘heirs of the body’ create an estate-tail in the first taker, is that they include the issue *in infinitum*.”—Hodgson v. Bussey, 2 Atk. 89. Of course, they cease to have that effect, when it is made to appear that they refer, not to the issue *in infinitum*, but only to such issue as shall be living at the death of the first taker.

The feature of the deeds which is relied on as showing that Mrs. Sledge took only a life-estate, and that the words “heirs of her body” were used only as a designation of the persons who at her death should answer that description, is the provision that the slaves shall be held “for the sole and separate use and benefit, and for the support and maintenance of the said Dorothea Sledge and the heirs of her body;” and “to be enjoyed and held as a separate estate of the said Dorothea and the heirs of her body, by and through her trustee, for her sole use and benefit, and for her separate support and maintenance, and that of the heirs of her body.” We are unable to perceive anything here which clearly indicates that the estate given by the deed to Mrs. Sledge was to terminate with her life; and that a separate and distinct estate, created by the deed, was to vest in the persons who at her death should fill the description of “heirs of her body.” The entire property, the whole equitable estate, is given by the deed; and we know of no principle of construction, which will authorize us to confine the provision for the support and maintenance of the heirs of her body to those only who might be such at her death. These words, construed according to their legitimate import, embrace all the lineal descendants of Mrs. Sledge, through all generations; and there must be strong evidence of an intention to use them simply as *descriptio personarum*, to

justify a court in assigning to them any other than their customary and appropriate meaning.—*Jesson v. Wright*, 2 Bligh, 1; *Hollifield v. Steel*, 17 Geo. 285; *Supp. to Lewis Perp.* 79.

A much more plausible view is, that these words are here used in the sense of *children*; that the gift in the first instance was directly to Mrs. Sledge and her children, and that the children took immediately, as tenants in common with her of the equitable estate. But, in the absence of some more definite indication that such was the sense in which the words were employed, we cannot so far wrest them from the meaning which has for ages been affixed to them, and upon which as a basis a rule of property has been established which is in force wherever the common law prevails. The deed is by no means inartificially drawn, and we cannot apply, in its construction, the liberal rules sometimes adopted in the case of instruments evidently prepared by an ignorant and unskillful hand. Although the intention of the donor must prevail, yet, in ascertaining it, the words which he uses are to be taken in their natural and proper sense; which implies, that technical words are to be construed according to their technical meaning, unless a clear indication is furnished by the context that they were used in a different sense. And if the same words occur in different parts of the same instrument, they must be taken to have been everywhere used in the same sense, unless from the context there appears an intention to the contrary.—*Hone v. Vanschaick*, 3 Comstock, 538; *Thelluson v. Woodford*, 4 Vesey, 329; 2 Wms. Ex'rs, 925-6-7.

Considered in the light of these familiar rules, the proper construction of this provision would seem to be, that the support and maintenance which Mrs. Sledge and the "heirs of her body" were to derive from the use of these negroes, were designed to be successive, not simultaneous—that the use to be enjoyed by the heirs of her body was not to begin until hers had terminated; "for", as Lord Coke quaintly says, "the ancestor during his life beareth in his body, in judgment of law, all his heirs; and therefore it is truly said, that *hæres est pars anteces.*

sortis."—2 Coke's Litt. 146. This is but another form of the maxim, "*nemo est hæres viventis*." And hence the limitation to the heirs of the body of Mrs. Sledge could not take *in præsentis*.

The cases which seem to afford the most countenance to the construction insisted on by the appellants, are *Fellows, Wadsworth & Co. v. Tann*, (9 Ala. 999,) and *Powell v. Glenn*, (21 Ala. 458.) There are three material circumstances which distinguish the first of these cases from this. The estate of the first taker (Mrs. Barnett) was expressed to be "during her natural life." The "support and maintenance", which the heirs were to have out of the property, were to be derived only while it was under the control and management of Mrs. Barnett, and, consequently, terminated with her life. There was an express period provided when the property was to be divided, namely, the death of Mrs. Barnett; thus implying that the words "heirs of the body" referred to the heirs who should then be living.

In *Powell v. Glenn*, *supra*, the question arose upon the will of Robert Graves. By the 4th and 5th clauses of his will, the testator made separate bequests to his two daughters and to the heirs of their bodies. The 6th clause was in these words—"It is hereby declared more fully to be my intention, that the negroes willed and devised to my two daughters, as above, is for their support and maintenance, and to the support and maintenance of the heirs of their bodies begotten, or to be begotten; and to descend directly, after their death, to the heirs of their bodies begotten. If either of my daughters above named should die without an heir of their body begotten, then, and in that case, the property so willed to them, or to the one that may so die without an heir, the property of the one so deceased shall pass off, and become the property of my surviving daughter and of my two sons, or their heirs; each one to have a share alike in the property so willed to the one so dying without heirs." The will had been previously before the court in the case of *Williams v. Graves*, (17 Ala. 62;) and it was then held, that the limitation over in favor of the surviving daughter and the

two sons was valid as an executory devise. That decision was rested mainly on the ground, that where a limitation over, after a dying without issue, is created by the word *survivor* or *survivors*, the courts will construe the words to mean issue living at the death of the first taker; and it is there said, that to support a limitation over, when applied to personalty, the courts will lay hold of slight circumstances or expressions to relieve themselves from the construction of an indefinite failure of issue. 17 Ala. p. 65; see, also, 18 Ala. 132.

We apprehend, no such rule prevails where there is no limitation over, and where the sole question is whether an apparently absolute estate is, by other expressions, cut down to one for life. In *Powell v. Glenn*, *supra*, the previous decision in *Williams v. Graves* was approved and adhered to. It is true that, in the opinion delivered by Chief-Justice Dargan, much stress was laid upon the provision, that the slaves given to the daughters should be for their support and maintenance, and for the support and maintenance of the heirs of their bodies begotten, or to be begotten. But the argument derived from this provision was employed merely as cumulative of the grounds on which the previous decision had been placed. The principle which was held to govern the case, and under the influence of which the court departed from the technical meaning of the words, was, that "heirs of the body" will be construed as words of purchase, and not of limitation, whenever it is apparent from the whole instrument that the estate of the first taker is restricted to an estate for life, and that the property, as a separate and distinct estate, is to vest in the children of the first taker who may be living at his death.—p. 467.

Now, there were several features of the will in that case, which served to indicate an intention to confine the estate of the first taker to one for life. In the first place, there was the limitation over to the *survivors*, in the event of the death of either daughter without heirs; as to the force of which, see *Williams v. Graves*, *supra*. Again, it is clearly indicated, (and in this respect the provision is materially different from that found in the present deed,)

that the direction for "the support and maintenance" of the heirs had reference only to a period co-extensive with the life-time of the first taker; for it is expressly provided, that the property itself (not the mere right to support and maintenance out of it) is "to descend directly, after their death, to the heirs of their bodies;" terms which, of themselves, show that the testator supposed that the estate of the first taker would terminate with her life.—*McVay v. Ijams*, 27 Ala. 238, 244. As the support and maintenance provided for the heirs were to terminate with the life of the first taker, this was, as Chief-Justice Dargan argued, a circumstance strongly indicating that the testator supposed that the children of his daughters would derive a benefit from the use of the slaves even before the death of their mother. These different provisions, when taken together, showed plainly that the testator intended that the estate of the daughter should cease with her life, and that the property should then vest in her children, or, in default of children at the time of her death, in the surviving sister and two brothers. But neither of these features, upon the united effect of which the court passed in that case, is to be found in the deed before us. There is here no limitation over in the event of the death of Mrs. Sledge without heirs. The donor does not seem to have anticipated such a contingency as the failure or termination of the estate given to his daughter and the heirs of her body. There is no provision that the property itself is to descend directly after the death of the first taker to the heirs of her body. There is no provision or expression limiting the support and maintenance which the heirs were to derive from the use of the property to the life-time of the first taker, and, therefore, no necessary implication that they were to take a benefit from such use before the death of Mrs. Sledge. We think, that neither of the cases referred to is an authority in support of the construction insisted on by the appellants; and that, under these deeds, Mrs. Sledge took the absolute equitable estate in the property.—*Ewing v. Standifer*, 18 Ala. 400; 15 *ib.* 373; 5 *ib.* 578; 26 *ib.* 593; 22 *ib.* 433.

Decree affirmed.

MCNEILL'S ADM'R vs. MCNEILL'S CREDITORS.

[BILL IN EQUITY BY ADMINISTRATOR FOR SETTLEMENT OF INSOLVENT ESTATE.]

1. *Jurisdiction of equity over settlement of decedents' estates.*—In this State, the chancery court retains its original jurisdiction over the administration of decedents' estates, and may be appealed to by a proper party, before the concurrent jurisdiction of the probate court has attached, without the assignment of any special reason; but, to authorize an executor or administrator to seek its aid and instruction, he must show some special circumstances, requiring or justifying its interposition.
2. *Payment of debts by administrator of insolvent estate.*—In paying debts, not of a preferred class, before the expiration of eighteen months from the grant of administration, an administrator acts at his peril: if the estate afterwards proves to be insolvent, he cannot charge it with the amount so paid by him, though he may be substituted for the creditors so paid, and receive the distributive share of the assets to which they would have been entitled; and this relief he may obtain in the probate court, without resorting to chancery.
3. *Payment of debt by administrator, as surety of intestate; subrogation of surety to vendor's lien.*—If the administrator of an insolvent estate pays in full, with his own individual funds, a note given for the purchase-money of land on which he was bound as his intestate's surety, he thereby becomes a creditor of the estate, and may obtain his *pro-rata* share of the assets on settlement of the estate before the probate court; but he cannot claim to be subrogated, in equity, to the vendor's lien on the land.
4. *Purchase by mortgagee at his own sale.*—A purchaser of land, having executed to his vendor a mortgage to secure the payment of the purchase-money, and having afterwards resold the land to a third person, who agreed that he would discharge the unpaid balance due to the vendor, and that the land should remain bound by the mortgage, is not within the rule which forbids a mortgagee to purchase at his own sale, and may become the purchaser at the sale under the mortgage.
5. *Contest between administrator and bailee.*—If the administrator of an insolvent estate ships cotton belonging to the estate to a commission-merchant, who retains the proceeds of sale, under an alleged contract with the intestate in his life-time, in payment of balance due on account for advances, &c., the probate court is fully competent to grant to the administrator all the relief to which he may be entitled.

6. *Satisfaction of mortgage by administrator.*—The administrator of an insolvent estate has authority to discharge an incumbrance on property belonging to it, whenever the interests of the estate would be thereby promoted; but, after selling, under an order of the probate court, lands which were incumbered by a mortgage executed by the intestate in his life-time, he cannot pay the mortgage debt in full out of the proceeds of sale, and charge the estate with the payment.
7. *Parties to injunction suit.*—It is improper to make the probate judge a defendant to a bill in chancery which seeks to enjoin the settlement of an estate pending in his court.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 29th January, 1858, by Andrew J. Pool, as the administrator of Daniel S. McNeill, deceased, against the creditors and heirs-at-law of said McNeill; and the probate judge of Dallas was also joined as a defendant. The object of the bill was, to remove the settlement of said McNeill's estate into the chancery court, and to obtain equitable relief to the administrator on the several special grounds hereinafter more particularly explained. It appears from the allegations of the bill, that the said McNeill died, intestate, in Dallas county, which was the place of his residence, on the 28th October, 1853, leaving as his heirs-at-law his widow and several minor children; that letters of administration on his estate were granted by the probate court of said county, shortly after his death, to one James D. Craig, who, after returning an inventory and appraisement of the estate, resigned his office on the 9th December, 1854, and letters of administration *de bonis non* were on the same day granted to the complainant; that the complainant, as such administrator, reported said estate insolvent on the 18th October, 1854; that it was duly declared insolvent by said probate court on the 11th December, 1854, and, on the failure of the creditors to nominate some other suitable person, the complainant was continued in office by the court as administrator *de bonis non*. The other material allegations of the bill, on which was predicated a claim to equitable relief, may be thus stated:

1. Before the report of insolvency was made, (which was made within twelve months after the grant of administration on the estate,) the complainant, being ignorant of the great indebtedness of the intestate, and believing in good faith that the estate was entirely solvent, paid with his own individual funds a large number of claims against the estate; and he claimed in his bill that, on account of this ignorance and mistake as to the facts, he should "be permitted to retain in his hands the full amount so paid out by him, with interest thereon from the time of said payments respectively, and be subrogated to the rights of the said creditors."

2. In January, 1853, the intestate purchased from one Hitchcock a house and lot in Mobile, at the price of \$5,700; paid a part of the purchase-money in cash, and executed his two notes for a part of the residue, with the complainant as his surety, payable respectively two and three years after date. At the time this contract was made, Hitchcock executed a conveyance of the land to the intestate, who, "at the same time, executed and delivered to said Hitchcock a mortgage on said property, to secure the payment of the balance of the purchase-money;" a copy of which mortgage, marked "Exhibit C", was annexed to the bill, and prayed to be taken as a part thereof. On the 31st August, 1854, the complainant, as administrator, filed his petition in the probate court, praying an order for the sale of this house and lot, on the ground that such sale was necessary for the payment of debts, and that it could not be fairly and beneficially divided among the heirs. The court granted the order of sale, "and the property was accordingly offered for sale, under said order, subject to said mortgage lien", on the 8th January, 1855, and was knocked off to said Hitchcock, as the highest bidder, at the price of \$2,125. Hitchcock having failed to comply with the terms of the sale, the complainant instituted an action at law against him, to recover the amount of his bid; but the suit was successfully defended, and judgment for the costs rendered against the complainant, on the ground that the order of sale and the proceedings had under it were void. After-

wards, (at what precise time is nowhere stated,) "the law-day of said mortgage having passed, said Hitchcock advertised said house and lot for sale under said mortgage; offered the same for sale, at public outcry, for cash. and then and there became himself the purchaser, at the price of \$2,050",—a sum alleged to be much less than its real value. Hitchcock afterwards brought suit against the complainant, on the notes given for the purchase-money of the land as above stated, and recovered a judgment against him for the balance due thereon, after deducting the amount realized by the mortgage sale; and this judgment the complainant was compelled to pay out of his individual funds. In reference to these transactions, the complainant prayed that he might be allowed to redeem the house and lot, with the funds in his hands belonging to the estate; that the property might be resold, under the order of the court; and that he might be permitted to retain, out of the proceeds of sale, the full amount paid by him under the judgment, "and be subrogated to the rights of the creditor, the said vendor".

"Exhibit C", above referred to as a mortgage from the intestate to Hitchcock, is in the following words:

"State of Alabama, } Whereas, John A. Hitchcock
Mobile county. } hath, on the day of the date here-
of, bargained, sold, and, by warranty deed of himself
and wife, duly conveyed to me, all that certain house and
lot, located in the city of Mobile, which was *deeded* to said
Hitchcock by Samuel Ferguson, by deed dated November
1st, 1850; (which deed is of record in the office of the
judge of said county, in book No. 5, N. S., pages 61-63;) upon which property there is a mortgage, executed by
said Hitchcock and wife, to said Ferguson, to secure the
payment of three promissory notes, made by said Hitch-
cock, for the sum of \$750 each,—the last two of which
notes are unpaid, and one to fall due on the 1st Novem-
ber, 1853, and 1854, with interest thereon respectively
from the 1st November, 1850: Now, this agreement wit-
nesseth, as part consideration, as purchase-money by me
paid said Hitchcock for said house and lot, I have agreed,
and do by this writing agree with said Hitchcock, to

allow said mortgage to remain as an incumbrance upon said property, until such time as the said last two notes shall be by me paid; and I do further agree to pay, cancel and take up said last two notes, at or before the maturity thereof, and to hold the said Hitchcock harmless in regard to the same. In witness whereof, I have hereunto set my hand and seal, this 20th January, 1853."

"D. S. McNEILL."

3. At the time of the intestate's death, he was indebted to McDowell, Withers & Co., commission-merchants in Mobile, in the sum of \$15,000, or more, principally on account of moneys advanced by them to him. The complainant, after his appointment as administrator, shipped to said McDowell, Withers & Co. eighty bales of cotton belonging to his intestate's estate. This cotton was sold by said commission-merchants, and netted over \$3,000; which sum they retained, without instructions from complainant, in part payment of the amount due to them from the intestate. After the estate had been reported and declared insolvent, the complainant advised said McDowell, Withers & Co. by letter of that fact, and demanded that they should pay over to him the proceeds of said cotton; but they refused to do so, "and claimed that they had a specific lien on said cotton, under and by virtue of a contract made with them by said intestate in his life-time, by which he gave them a lien on his growing crop for advances made by them to him, and under which they had made said application of said money." Being advised that said contract, if any such was made, was not binding as against the other creditors of the estate, the complainant instituted an action at law against said McDowell, Withers & Co., to recover the proceeds of said cotton; but the action was successfully defended, the validity of the contract and appropriation was sustained by the court, and judgment for the costs was rendered against the complainant. In reference to this item, the prayer of the bill was, "that the said eighty bales of cotton, or the proceeds thereof, as sold by said McDowell, Withers & Co., may be decreed to have been held by them under a specific lien or contract with the said D. S. McNeill

in his life-time, and as forming a credit on said account; and that complainant may not be in any other manner required to account for the same."

4. On the 29th September, 1851, the intestate purchased from Mrs. Elizabeth A. Givhan, executrix of the last will and testament of Thomas A. Givhan, deceased, a large tract of land, situated in Dallas county; received from her a conveyance, and executed to her his several notes for the purchase-money, together with a mortgage on the land to secure their payment; and, at the time of his death, two of these notes were due and unpaid. This tract of land was included in the complainant's petition, and in the order of sale granted by the probate court, as above stated; and was sold, under the order of the probate court, on the 13th January, 1855. Out of the proceeds of this sale the complainant paid in full the amount due to Mrs. Givhan; and he claimed in his bill a credit for the full amount of this payment, on the ground that the mortgage constituted a specific lien on the land, notwithstanding the insolvency of the estate, and that the purchaser at his sale might have compelled him to apply the proceeds of sale to the satisfaction of the mortgage.

5. In October, 1851, the intestate purchased a negro from one J. C. Hutchinson, and executed his two promissory notes for the amount of the purchase-money, with the complainant as his surety. After the death of the intestate, Hutchinson brought suit against the complainant on these notes, and recovered a judgment against him; which judgment the complainant paid, on the 4th January, 1855, after the estate had been declared insolvent. The prayer of the bill in reference to this item was, that the complainant might be subrogated to the rights of Hutchinson as a creditor of the estate, and might receive his *pro-rata* share of the assets.

6. On the 15th January, 1858, the probate court allowed, as valid claims against the estate, two judgments which Cook & Johnson had recovered against the complainant as administrator, and which were founded on debts contracted by the intestate in his life-time. The justness of these claims was denied by the complainant, and their

payment resisted; and he also objected to their allowance by the probate court, because they had not been filed as claims against the estate within nine months after the declaration of insolvency, and reserved a bill of exceptions to the ruling of that court in allowing them. Before the allowance of these two claims, the probate court had declared a dividend of forty per cent. in favor of the creditors of the estate, and the complainant had paid them that amount; and if these two claims were now allowed, it would be necessary to reduce this dividend, and to require re-payment from the other creditors. The complainant therefore asked the court to instruct him whether he should take an appeal from the probate to the supreme court, and prayed that the assets of the estate might be marshaled under the directions of the chancellor.

A demurrer to the bill, for want of equity, was interposed by several of the creditors, and was sustained by the chancellor; and his decree, dismissing the bill on that ground, is now assigned as error.

J. R. JOHN, for appellant.

BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—The first argument in favor of the equity of the complainant's bill is, that it is the privilege of an administrator, at any time before the concurrent jurisdiction of the probate court is put in operation, to seek from the chancery court instruction in the duties of his trust, and to make a settlement under the orders and decrees of that tribunal. Under our system, the chancery court retains its original jurisdiction over the subject of administrations; and it may be appealed to by a proper party, without the assignment of any special reason, until the concurrent jurisdiction of the probate court has attached.—Gould v. Hays, 19 Ala. 450; Horton v. Moseley, 17 *ib.* 794; Wilson v. Crook, *ib.* 59; Pearson v. Darrington, 18 *ib.* 350; Dement v. Boggess, 13 *ib.* 143; Blakey v. Blakey, 9 *ib.* 391; Hunley v. Hunley, 15 *ib.* 98; Waldron, Isley & Co. v. Simmons, 28 *ib.* 629; 1 Story's Eq. Ju. §§ 543-44-45; Cherry & Bell v. Belcher, 5 St.

& P. 133; Gayle v. Singleton, 1 St. 566. There is authority which may be construed as favoring the proposition, that an administrator may, as a matter of course, ask the aid of the chancery court in the execution and settlement of his trust.—Buccle v. Alteo, 2 Vern. 37; Matthews v. Newby, 1 Ver. 133; Howard v. Howard, *ib.* 134; Mitford's Eq. Pl. (top page) 155–56. But that doctrine was found objectionable, because it enabled an administrator to delay the payment of just dues, and for other reasons; and it seems to have given place to the more just and reasonable doctrine, that an administrator or executor may go into chancery, “when he finds the affairs of his intestate or testator so much involved, that he can not safely administer the estate, except under the direction of a court of equity”; and that the court ought only “to interfere in behalf of an executor or administrator under special circumstances, where injustice to himself, or injury to the estate, may otherwise arise.”—Morrice v. Bank of England, Cas. temp. Talb. 217–224; Brown v. McDonald, 1 Hill's Ch. (S. C.) 300; 1 Story's Eq. Ju. § 544; Toller on Ex. 455, book 3, chap. 10, § 2; 2 Lomax on Ex. (marg. page) 388, (top) 623; 2 Will. on Ex. 1624, note *g*; Willard's Eq. Ju. 560. Such seems to have been the view of the law taken by this court when it decided the cases of Trotter v. Blocker, (6 Port. 269,) and Sellers v. Sellers, at the last term. The equity of the complainant's bill, therefore, can not stand upon his right to come into equity, as a matter of course, for its aid and instruction, and we must inquire whether such special circumstances are averred as will give jurisdiction.

[2.] One of the special circumstances, upon which the complainant argues that the jurisdiction of the court may be predicated, is, that he, being misled by the magnitude of the estate, and his ignorance of the extent of his intestate's indebtedness, and not suspecting the insolvency of the estate, within eighteen months from the commencement of his administration, paid the full amounts of sundry debts with his own individual funds. Under our law, all claims against an estate, with a few exceptions, are required to be presented within eighteen months; the

executor or administrator is prohibited from giving, before the expiration of eighteen months, "a preference in the payment of any debt over others of the same class"; and he is protected against the rendition of judgments against him, until after the expiration of eighteen months.—Code, §§ 1883, 1742, 1917. The representative of an estate is thus favored with the means of ascertaining with sufficient certainty, in most cases, the condition of the estate, and relieved from the necessity of paying any debts, and prohibited from giving any preference among debts of the same class, within eighteen months. It follows, that if an administrator, within the eighteen months, pays in full a debt not within a preferred class, the estate being insolvent, he gives a preference in violation of law, and does so by making payment at a time when the law does not require it. The making of payment at such time, involves a hazard voluntarily assumed; and if loss results, he must sustain it, and can not distribute it among creditors of the estate, by obtaining an allowance to himself of the full amount of the claims so paid. The complainant is, therefore, not entitled to charge against the estate now, when it has been declared insolvent, the full amount of the claims discharged by him with his own funds during the eighteen months, and before the insolvency of the estate was discovered. His only right, as against the estate, is to stand substituted for the creditors whose claims he has discharged, as a claimant against the insolvent estate, and to take the same distributive share to which those creditors would have been entitled.—*Watkins v. Dorsett*, 1 Bland, 530; *Collinson v. Owens*, 6 G. & J. 4; *Smith v. Hoskins*, 7 J. J. Marsh. 502; *Hearin v. Savage*, 16 Ala. 286-294.

We perceive no reason why this substitution could not be as well recognized in the probate court, as in the chancery court. By the payment of the debts, the administrator became, in effect, the assignee of the debts he has paid; and the probate court may take cognizance of his rights as such, and give effect to them by making the proper allowance upon his settlement.—*Graham v. Abercrombie*, 8 Ala. 552. As the probate court is clothed with

the power requisite to afford the complainant all the relief to which he is entitled in consequence of the payment of claims against the estate, the fact of such payment is not a special circumstance upon which the jurisdiction of the chancery court can be predicated. And it is just and right that it should not be; for, if it were, the carelessness and recklessness of an administrator would be a reason for subjecting the creditors to the delay and expense of a chancery suit, instead of the cheap and expeditious proceeding in the probate court.

[3.] The bill is totally without equity as an application to redeem, or for authority to redeem, the land alleged to have been sold under Hitchcock's mortgage, because more than two years had elapsed before the filing of the bill, or the making of any application to redeem.—Code, § 2116. The payment by the complainant, as the surety of his intestate, of a part of the purchase-money of the land bought from Hitchcock, affords no reason for equitable interposition. By such payment, the complainant became a creditor of the estate, and is entitled to his *pro-rata* share with other creditors, which the probate court is fully competent to allow. Nor has the complainant any right of substitution to a lien of Hitchcock as vendor, who conveyed the land, for a part of the purchase-money paid by him as his intestate's surety.—*Foster v. Trustees of Atheneum*, 3 Ala. 302.

[4.] The bill also fails to make out a case for equitable jurisdiction upon the ground, that Hitchcock was a mortgagee of the land bought from him, and sold the land under his mortgage, and bought at his own sale. "Exhibit C", which is made a part of the complainant's bill, and is referred to as containing a copy of the mortgage under which the land was sold, shows that the mortgage upon the land was not given to Hitchcock, but was given by Hitchcock to one Ferguson, to secure the payment of the purchase-money due by the former to the latter; and that, upon the subsequent purchase by the complainant's intestate from Hitchcock, there was an agreement that the complainant's intestate should discharge the unpaid purchase-money due by Hitchcock to his vendor, and that

the land should remain bound by the mortgage. Hitchcock, therefore, was not a mortgagee of the land, and could not have been a purchaser at a sale made by himself as mortgagee.

[5.] If McDowell, Withers & Co. had a lien upon eighty bales of cotton, which they rightfully asserted by retaining the proceeds of the sale, it does not justify the complainant's resort to the chancery court. It is as competent for the probate court, as it is for the chancery court, to relieve him from the charge for the eighty bales of cotton, or their value, if he is entitled to such relief.

[6.] When it would promote the interest of an insolvent estate, the administrator has authority to discharge incumbrances upon the property of the estate. But he certainly can not charge the estate with removing an incumbrance, after the property so incumbered has been sold, when there is no liability upon him on account of the defective title, and when the estate is not interested in the removal of the incumbrance. The complainant, as administrator, sold, under an order of court, lands which were incumbered with a mortgage in favor of Mrs. Givhan. After this sale was made, he discharged in full the debts secured by the mortgage; and he now claims to have been justified in doing so, because there was a mortgage lien upon the land for the debts. When the sale was made under the order of court, nothing was sold save the interest of the estate, which was the equity of redemption in the land, or the land incumbered by the mortgage; and the maxim, *caveat emptor* , applied to the purchaser.—*Duval's Heirs v. McLoskey*, 10 Ala. 636; *Doe v. McLoskey*, 1 *ib.* 708; *Perkins v. Winter*, 7 *ib.* 855; *Vaughn v. Holmes*, 22 *ib.* 593. After the sale was made, the equity of redemption was vested in the purchaser, and the complainant was under no legal obligation to remove the incumbrance. In paying the entire debt secured by the mortgage upon the land, the complainant has acted without any legal authority, and is entitled to no relief as against the insolvent estate, or its creditors, on account of the fact that the debt was secured by a mortgage on the land.

Upon principles heretofore announced, the complainant must come in as a creditor of the insolvent estate in the probate court, for the money paid by him, as the surety of his intestate, to Hutchinson.

[7.] It was manifestly improper to make the judge of the probate court a defendant, and we concur in and adopt the language of the chancellor disapproving it.

The bill contains no equity, and the decree of the court below is affirmed.

CLEMENT vs. CURETON.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Objection to responsiveness of answer.*—An objection to a part of a deposition, on the ground that it is not responsive to any interrogatory, cannot be made for the first time during the trial.
2. *To what witness may testify.*—A witness cannot be asked to state why another person did a particular act.
3. *Error without injury in allowing illegal question to witness.*—The appellate court will not inquire into the legality of a question propounded to a witness, when the answer thereto elicited no illegal evidence.
4. *Difference between sale and exchange, and construction of statute (Code, §§ 399-400) forbidding sale of slave by unlicensed negro-trader.*—The charges of the court to the jury in this case, relative to the difference between a sale and an exchange, and as to the construction of the statute (Code, §§ 399-400) forbidding the sale of a slave by an unlicensed negro-trader, held, on the authority of *Williamson v. Berry*, (8 How. U. S. R. 544,) to contain no error prejudicial to the appellant.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by John T. Cureton, against Elizabeth W. Clement, to recover damages for a breach of warranty of the soundness of a slave, a negro man

named Burrell. The defendant pleaded the general issue, with leave to give in evidence any special matter of defense; and also two special pleas, each averring, in substance, that the consideration of the sale of the slave Burrell, by the defendant to the plaintiff, was the sale of another slave, Louisa by name, by the plaintiff to the defendant; that the plaintiff was at that time a negro-trader, and had not procured a license as required by the statute; and that the sale was consequently void. The court overruled a demurrer to these special pleas, and issue was then joined upon them.

The material question in the case was, whether the contract between the parties was a sale or an exchange of slaves; the plaintiff contending that it was an exchange, and the defendant that it was a sale. The opinion of this court renders it unnecessary to give a detailed statement of the evidence. On the trial, as the bill of exceptions states, the defendant read in evidence the deposition of H. R. McLain, who was the overseer of his negroes at the time of the contract between him and the plaintiff, and whose deposition was taken on interrogatories and cross interrogatories. The 7th direct interrogatory to this witness, and his answer thereto, were in the following words: *Qu.* "Do you, or not, know whether the said boy Burrell, on or about the time of the sale or exchange between the plaintiff and defendant, was sick or complaining in any way? and if he was sick, or had complained in any manner, would you not have known or heard of it?" *Ans.* "I certainly would have known or heard of it, if he had been sick or complaining. *By my orders, when a negro got sick on the place, he had to come to me immediately, if I was about the place; and if Burrell was or had been sick at the time of said exchange, I never heard of it, and he never made any complaint to me.*" The plaintiff's counsel objected to the italicized portion of this answer "during the reading of the deposition"; and moved to exclude or strike it out; the court sustained the objection, and the defendant excepted.

The plaintiff introduced a witness named Charles, and, during his examination, asked him, "why Cureton sold

or traded Louisa to the defendant." The defendant objected to this question, "as irrelevant, illegal, and improper", and reserved an exception to the overruling of his objection. The witness answered, "that it was to realize the money to pay him for the negro of his which Cureton had exchanged for Louisa."

"The defendant introduced one Watson as a witness, who testified, that he acted as the agent of the defendant, in part, in making the trade for the girl Louisa; that on the 21st May, 1856, he met or saw the plaintiff and Charles in Eutaw, and remarked to one or both of them, that the defendant wanted to trade off or swap the boy Burrell for another negro; that the parties met at his house the next day, and agreed on the terms of the contract, and then went back to the defendant's to conclude the trade, by giving bills of sale, and making a delivery of the respective slaves; that he did not accompany them, and was not present when the trade was consummated. On cross-examination of said witness, plaintiff's counsel asked him, whether the said contract between plaintiff and defendant was a sale or an exchange of the negroes; and the witness answered the question, by restating substantially what is above related. To this question and answer, each, the defendant objected, and reserved an exception to the overruling of his objections."

"The court thereupon charged the jury as follows:

"1. That [if] there was proof tending to show that the slave Burrell died of dysenteric typhoid fever, and that he had said fever, or the seeds of said disease, lurking in his system at the time of the execution of the paper purporting to be a bill of sale from the defendant to the plaintiff, this would be such an unsoundness as was covered by the warranty contained in said bill of sale.

"2. That a negro-trader was a person who engaged in the traffic of slaves as a business or employment, but that it was not necessary that this should be his chief or only employment; and therefore, if they should believe from the evidence that the plaintiff, whilst in the employment of the said Charles, merely sold one negro for him, in his absence, and exchanged another for the slave Louisa, and

afterwards purchased said Louisa from said Charles, as stated by said Charles, and then brought said Louisa to Greene county, and traded her off to the defendant, under the circumstances, and for the purposes testified to by said Charles,—this would not necessarily constitute the plaintiff a negro-trader, but the jury should look to these facts, in connection with the other facts in the case, as circumstances from which to determine whether or not the plaintiff was a negro-trader, within the meaning of the law as defined by the court.

“3. That although they might believe from the evidence that the plaintiff was a negro-trader at the time of the trade between himself and the defendant, the law did not prohibit him from swapping or exchanging the girl Louisa for the boy Burrell; and that if they believed from the evidence that the plaintiff fixed the price of his slave at \$1200, and the defendant fixed the price of her slave at \$1,000, and that this was done merely to ascertain the difference which the defendant should pay the plaintiff between the slaves, this would be an exchange, and not a sale: on the contrary, if they believed from the evidence that the plaintiff fixed said price on the slave Louisa, that the defendant agreed to take her at the price so fixed, and that the defendant fixed the price on the slave Burrell, and that the plaintiff agreed to take him, at the price so fixed, in part payment for the girl Louisa,—this would be a sale, and not an exchange.

“4. That whether the trade between the plaintiff and the defendant was a sale or an exchange, was a question to be determined by them, not by the name given to the transaction by the parties or witnesses, but from the facts and circumstances testified to by the witnesses, or shown by the evidence in the case.

“5. That although they might believe from the evidence that the slave Burrell was unsound at the time of the trade between the plaintiff and the defendant, yet, if they believed from the evidence that the plaintiff was at the time a negro-trader, and sold the slave Louisa to the defendant, and received the slave Burrell in part payment for her—then they should find a verdict for the defendant.,,

To all of these charges the defendant excepted, and she now assigns them as error, together with the adverse rulings of the court on the evidence.

WM. P. WEBB, with HERNDON & INGE, for appellant.

JOHN F. VARY, *contra*.

STONE, J.—A portion of the answer of the witness McLain, to the 7th interrogatory in chief, was stricken out on motion, made for the first time during the trial. The argument here made in support of the ruling of the court is, that the answer was not responsive to the interrogatory. When the answer of a witness is, as in this case, legal evidence, and the only objection is that it is not responsive to any interrogatory propounded, such objection can not be made during the trial.—*McCreary v. Turk*, 29 Ala. 244; *Saltmarsh v. Bower*, 34 *ib.* 613.

[2.] The question propounded to the witness Charles on cross-examination, and objected to, was illegal. It inquired for the *motive* of Cureton in disposing of the slave Louisa. The witness could not possibly know the motive which influenced the action of another person.—*Whetstone v. Bank at Montgomery*, 9 Ala. 875.

[3.] The question put on cross-examination to the witness Watson, elicited no illegal evidence. We need not, therefore, inquire whether the objection to it should have been sustained.

[4.] In the charge to the jury, we find no error of which the appellant can complain.—*Williamson v. Berry*, 8 How. U. S. 544.

Reversed and remanded.

WALKER vs. HUNTER.

[MOTION AGAINST SHERIFF FOR FAILURE TO MAKE MONEY ON FI. FA.]

1. *Supersedeas; description of execution.*—In the description of an execution in a *supersedeas*, the only essential particulars are, the parties, the amount required to be made, the court from which, and the time when it was issued. When the sheriff is ruled for failing to make the money on the execution, and relies on the *supersedeas* proceedings as a defense, a defective description of the execution in the *supersedeas* may be aided by reference to the petition, fiat and bond to which it refers; and the execution which was superseded being thus identified with the execution on which the motion is founded, the plaintiff cannot take advantage of immaterial discrepancies between it and his own description of it in his motion.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. JNO. GILL SHORTER.

AT the September term, 1858, of the circuit court of Chambers, the appellant made a motion for a summary judgment against William H. Hunter, the sheriff of said county, and the sureties on his official bond, for the failure of said sheriff to make the money on an execution, which was thus described in the motion: "A writ of *feri facias*, issued from the office of the clerk of the circuit court of Chambers county, on the 14th day of April, 1858, in favor of Maria Walker, executrix of John H. Walker, deceased, plaintiff, and against Benjamin L. Goodman, Robert Mitchell, James S. Mitchell, and James E. Reese, defendants, for the sum of \$3,784, due by original judgment rendered the 26th day of March, 1853, and the further sum of \$378 as damages awarded by the supreme court in said cause, with interest thereon from the 26th day of March, 1853, and \$190 57 costs of suit, returnable to the term of said circuit court to be holden for said county of Chambers on the second Monday in September, 1858. The bill of exceptions states, that the defendant "took

issue on the allegations of plaintiff's motion, and also filed a special plea; to which special plea the plaintiff demurred, on the ground that the *supersedeas* does not embrace the execution in this case; which demurrer being overruled, the plaintiff excepted, and then took issue on said special plea." In another part of the bill of exceptions the pleadings are set out, showing that the defendant "took issue on the allegations of the plaintiff's motion", and pleaded, in short by consent—1st, "that the execution described in plaintiff's motion was issued by the clerk of this court without authority of law"; and, 2d, "that the execution on which the plaintiff's motion is founded was returned by defendant, on the 6th September, 1858, to the office of the clerk of this court, without making the money, by virtue of an order, or *supersedeas*, issued by the clerk of this court on the 30th July, 1858, and served on defendant as sheriff on that day, as is evidenced by his acceptance of service,—which said writ, or order, superseding said execution, is hereto attached, and made part of this plea, by consent, as though set out at length"; and that the plaintiff took issue on the first plea, and replied to the second, "in short by consent, that the execution mentioned has not been superseded."

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the execution on which her motion was founded, which was issued from the office of the clerk of said circuit court on the 14th April, 1858, and commanded the sheriff to make of the goods and chattels, &c., of Benjamin L. Goodman, Robert Mitchell, James S. Mitchell, and James E. Reese, "the sum of \$3,784, which Maria Walker, executrix of John H. Walker, deceased, recovered of Benjamin L. Goodman and Robert Mitchell, on the 26th day of March, 1853, by the judgment of our circuit court held for the county of Chambers, together with ten per cent. damages thereon—to-wit, the sum of \$378 damages—awarded by the supreme court of the State of Alabama against them, and also against the said James S. Mitchell, security upon appeal bond to said supreme court,—which several sums having been enjoined by them, and the injunction dissolved, is

due from them and the said James E. Reese, security on the injunction bond, as certified to me by Andrew J. Carlisle, register of said chancery court; besides the costs of said suit", &c. The plaintiff then proved, that the defendant Hunter was the sheriff of the county when this execution went into his hands; that the other defendants were the sureties on his official bond; and that the defendants in said execution, while the writ was in the sheriff's hands, had property in their possession, subject to said execution, and more than sufficient to satisfy it. She then proved and read in evidence—1st, the original judgment in her favor, against said Benjamin L. Goodman and Robert Mitchell, which was rendered on the 26th March, 1853; 2d, an appeal bond, executed by said Goodman and Mitchell on the 29th April, 1853, together with James S. Mitchell as their surety, for the purpose of removing the case to the supreme court; 3d, a certificate of the clerk of the supreme court, dated the 24th February, 1857, to the effect that the judgment had been affirmed by the supreme court, with ten per cent. damages against the original defendants and James S. Mitchell, their surety on the appeal bond; 4th, the record of a chancery suit, instituted by said Goodman and Mitchell on the 12th March, 1857, for the purpose of perpetually enjoining the said judgment at law,—in which suit, the bill was dismissed by the chancellor, for want of equity, and the injunction dissolved, at the May term, 1857; 5th, an appeal bond, executed by said Robert Mitchell, on the 18th June, 1857, with J. W. Kellam as his surety, on prosecuting an appeal from the chancellor's decree to the supreme court; 6th, a bond executed by said Robert Mitchell, on the 28th August, 1857, with James S. Mitchell as his surety, for the purpose of reinstating the injunction until the determination of the appeal; 7th, a certificate of the clerk of the supreme court, dated the 6th April, 1858, stating that the chancellor's decree had been affirmed by the supreme court, with ten per cent. damages; and, 8th, a certificate of the register in chancery, dated the 14th April, 1858, certifying to the said circuit court the proceedings had in the injunction suit.

The plaintiff having here rested her case, "the defendant then read in evidence, against the plaintiff's objection, his return as sheriff on the execution mentioned in the plaintiff's motion, as follows: 'By virtue of an order and writ of *supersedeas*, issued out of the circuit court of Chambers county, and dated the 30th day of July, 1858, I have stayed all proceedings on the attached execution, and returned the same to said court, this 6th September, 1858'; and then offered in evidence the following petition, with the fiat, bond and *supersedeas* issued thereon," &c. The petition for a *supersedeas* alleged, that at the spring term, 1853, of the circuit court of Chambers, Maria Walker, as executrix of John H. Walker, deceased, obtained a judgment against the petitioners, Benjamin L. Goodman and Robert Mitchell, for \$3,784; that from this judgment the petitioners sued out an appeal to the supreme court, where such proceedings (alleged to be void) were had, that in February, 1857, the clerk of said court sent down to the clerk of the circuit court a certificate of affirmance, with ten per cent. damages; that the clerk of the circuit court then issued an execution on said judgment, "against the petitioners as principals, and James S. Mitchell and James E. Reese, their securities, for the amount of the judgment of said circuit court, with the costs, and ten per cent. damages thereon; which execution is now in the hands of the sheriff of said county, and is the only one in his hands to which these petitioners are parties." In the *supersedeas* bond, the execution is described as having been "issued by the clerk of the circuit court of Chambers county, on the 14th day of April, 1858, in favor of Maria Walker, executrix of John H. Walker, deceased, against Benjamin L. Goodman, Robert Mitchell, James S. Mitchell, and James E. Reese, on a judgment obtained by said Maria Walker, executrix &c., against the said Benjamin L. Goodman and Robert Mitchell, in our said circuit court, then and there held for said county, on the 2d Monday in March, 1853, for the sum of \$3,784 10, together with costs of suit, and the further sum of \$378 40, damages adjudged by the supreme court." In the *supersedeas*, the execution is described as having been

"issued by the clerk of the circuit court of Chambers, on the 14th day of April, 1858, on a judgment obtained by Maria Walker, executrix &c., at a court held in and for said county of Chambers, on the second Monday in March, 1853, against Benjamin L. Goodman and Robert Mitchell, and now in the hands of the sheriff of said county, and the only one in his hands to which the said petitioners are parties," &c.

"The foregoing being all the evidence in the cause, the court thereupon charged the jury, at the request of the defendant, that if they believed the evidence as shown in the record and proof submitted, then the execution mentioned in plaintiff's motion was superseded, and on that issue they ought to find in favor of the defendants; to which charge the plaintiff excepted."

In consequence of the adverse rulings of the court above stated, to which exceptions were reserved, the plaintiff was compelled to take a nonsuit; and she now assigns these rulings of the court as error, and moves to set aside the nonsuit.

J. FALKNER, and S. F. RICE, for appellant.

L. E. PARSONS, and WM. P. CHILTON, *contra*.

R. W. WALKER, J.—The appellant moved against the sheriff and his sureties, for the failure of the former to make the money on an execution which is described in the motion. In support of the allegations of her motion, the appellant introduced in evidence the execution which is set out in the record; and she will not now be heard to say that it does not correspond with her own description of it. The execution is described in the motion as having been issued from the office of the clerk of the circuit court of Chambers county, on 14th April, 1858, "in favor of Maria Walker, executrix of John H. Walker, deceased, plaintiff, and against Benjamin L. Goodman, Robert Mitchell, James S. Mitchell, and James E. Reese, defendants, for the sum of \$3,784, due by original judgment rendered the 26th March, 1853, and the further sum of \$378 as damages awarded by the supreme court, with

interest thereon from the 26th March, 1853, and \$190 57, costs of suit, returnable to the term of said circuit court to be holden for said county of Chambers on the second Monday in September, 1858."

The writ of *supersedeas* served upon the sheriff, refers upon its face to the petition, fiat, and *supersedeas* bond; and we think that the sheriff had the right, in his defense, to resort to these for the purpose of supplying any want of fullness in the description which is given of the execution in the *supersedeas* itself.—See Welch v. Jones, 11 Ala. 661; Morrison v. Wright, 7 Porter, 67; Satterwhite v. State, 28 Ala. 70. While it may be true that the sheriff is not bound to look beyond the *supersedeas* served upon him, and could not be made liable for proceeding with the execution unless it was described with reasonable certainty in the *supersedeas*, (Payne v. Governor, 18 Ala. 322;) it does not follow, that in case he has obeyed the *supersedeas*, he may not help out the defective description of the execution in the *supersedeas*, by reference to the petition, fiat and bond to which it refers, and thus show, in his defense, that the execution in his hands, and on which he has suspended proceedings, was that to which the *supersedeas* was in fact applicable.—See 31 Ala. 678.

In order to the protection of the sheriff, it is not necessary that the *supersedeas*, or the petition and bond referred to by it, should describe the judgment upon which the execution issued with the same accuracy as is required in injunction and appeal bonds. These bonds affect the judgment itself, not simply the execution issued on it; and, on their breach, they have the force and effect of statute judgments. In such bonds, a misdescription, in an essential particular, of the judgments upon which they operate, is fatal.—Wiswall v. Munroe, 4 Ala. 9; Satterwhite v. State, 28 *ib.* 69; Dumas v. Hunter, *ib.* 688.

But a *supersedeas*, such as that which was issued in this case, is not intended to operate upon the judgment, but only on a particular execution in the hands of the sheriff. The officer is protected in obeying it, if the writ, either by itself, or in connection with the petition, fiat and bond to which it refers, shows with reasonable cer-

tainty, that the execution in his hands is that to which the *supersedeas* is applicable. The only essential matters in the description of an execution, are the parties, the amount required to be made, the court from which, and the time when it was issued.

The petition avers the recovery of the original judgment at the spring term, 1853, of Chambers circuit court, in favor of the appellant, against Benjamin L. Goodman and Robert Mitchell, for \$3,784, besides costs;—that said judgment was taken to the supreme court, where it was affirmed, with ten per cent. damages thereon; and that “the clerk of the circuit court of Chambers county has issued an execution on said judgment, against the petitioners, (Benjamin L. Goodman and Robert Mitchell,) as principals, and their securities, James S. Mitchell and James E. Reese, for the amount of the said judgment in said circuit court, and costs, and ten per cent. damages on said judgment”; and that there is but one execution in the hands of said sheriff to which the petitioners are parties. The *supersedeas* bond describes the execution as having been issued by the clerk of the circuit court of Chambers county, on the 14th April, 1858, “in favor of Maria Walker, executrix of John H. Walker, against Benjamin L. Goodman, Robert Mitchell, James S. Mitchell, and James E. Reese, on a judgment obtained by Maria Walker, executrix, &c., against the said Benjamin L. Goodman and the said Robert Mitchell, in our said circuit court, then and there held for said county on the 2d Monday in March, 1853, for the sum of \$3,784, together with costs of suit, and the further sum of \$378 40, damages adjudged by the supreme court.”

It is thus shown, that the parties to the execution, the amount required to be made, the court from which, and the time when it issued, are all correctly described in the petition and bond. In all essential particulars, the description of the execution there given conforms to that which is given in the motion of the plaintiff; and she will, therefore, not be heard to question its correctness. Although the petition may give an inaccurate account of the manner in which some of the defendants became par-

Park's Distributees v. Park's Adm'rs.

ties to the execution, this does not vitiate the description of the execution itself. In reference to the parties, amount, the court from which, and the time when it was issued, there is an exact correspondence between the execution described and that which was in the sheriff's hands; and when it is further added in the *supersedeas* and petition, that the execution to be superseded is the only one in the sheriff's hands to which the petitioners are parties, there is no doubt that the execution which is set out in the record, was designated with reasonable certainty as that to which the *supersedeas* was applicable. The court, therefore, did not err in instructing the jury, that if they believed the evidence, they must find for the defendant.

This is the only assignment of error insisted on in the argument of counsel, and we therefore notice no other.

It is proper to notice that the *supersedeas* is a common-law, not a statutory *supersedeas*.—Campbell v. May, 31 Ala. 570.

Judgment affirmed.

A. J. WALKER, C. J., not sitting.

PARK'S DISTRIBUTEES vs. PARK'S ADM'RS.

[BILL IN EQUITY FOR SETTLEMENT OF DECEDENT'S ESTATE.]

1. *Jurisdiction of equity over settlement of decedents' estates.*—After the settlement of a decedent's estate has been commenced in the probate court, it cannot be removed into the chancery court, by either party, without the assignment of some special reason justifying the interposition of equity.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellants, as

heirs-at-law and distributees of John Park, deceased, against Mrs. Sarah Park, the widow and administratrix, John A. Park, the administrator of said decedent, Allen L. Bailey and Jacob A. Flournoy, the sureties of said administrator and administratrix on their administration bond, Henry L. Wilkinson, and Warren Costley; and sought a final settlement and distribution of the estate of said John Park. The material facts alleged in the bill were these: John Park died in the county of Chambers, intestate, some time during the year 1853; leaving as his heirs-at-law and distributees his widow and children, the several complainants in this case, Mrs. Sarah Park, John A. Park, and Eleanor W. Park, since deceased. At the time of his death, said intestate was seized and possessed of a considerable estate, consisting of lands, slaves, money, and choses in action. In October, 1853, letters of administration on his estate were granted, by the probate court of Chambers, to Mrs. Sarah Park and John A. Park, who thereupon gave bond, with Allen L. Bailey and Jacob A. Flournoy as their sureties, and entered on the discharge of the duties of the administration. In November, 1853, said administrators returned to said probate court an inventory of said estate, which is charged in the bill to have been imperfect and incomplete. In December, 1854, they sold a portion of the real estate, under an order of the probate court, to one Andrew Park; which sale was confirmed by the probate court, and the complainants declared themselves satisfied with it. In October, 1855, said administrators applied to the probate court for an order to sell a portion of the slaves and other personal property belonging to the estate, and sold the same, under and pursuant to the order of the court, on the 14th January, 1856; and the complainants sought by their bill to hold said administrators and their sureties liable for the proceeds of said sale. The administrators kept said estate together, during the years 1854 and 1855, without any order of court, or other authority of law, and, during that time, wasted a considerable portion of the personal property; and the complainants asked that they might be charged with the rent of the land, the hire of the slaves,

and the value of the property wasted and lost during those years. In October, 1855, said administrators made a return for an annual or partial settlement, which is alleged in the bill to abound with errors and inaccuracies; and the bill prayed a discovery from them touching all the items in this account. Shortly after the sale of January 14, 1856, above mentioned, John A. Park fled from the country, without making any settlement of his administration on the estate, and was a non-resident when the bill was filed; and it is alleged that both he and Mrs. Sarah Park were insolvent. While the letters of administration of said Sarah and John A. Park were in full force and unrevoked, the probate court granted letters of administration *de bonis non* to Henry L. Wilkinson, the sheriff of the county, who, on the 21st January, 1856, returned to the court an inventory of the property unadministered, wrongfully including therein the slaves which had been sold by the administrators as above stated. In March and November, 1856, said Wilkinson procured from the probate court orders to sell these slaves for the payment of debts, sold them under the orders, and reported the sale to the court in April, 1857. In July, 1856, he also procured an order for the sale of the lands which had been previously sold; sold them, pursuant to the order, to one Warren Costley, who was the highest and best bidder; and reported the sale to the probate court,—by which court said sale was confirmed. The complainants insisted in their bill, that the grant of administration to said Wilkinson was void; that he was chargeable as an executor *de son tort*; that the sales made by him were void; and that, if the sales made by the first administrators were not held valid, the property should be resold under the order of the chancellor. Sarah and John A. Park were required, by an order of the probate court, to appear on the first Monday in February, 1856, and file their accounts and vouchers for a final settlement; but no citation was ever served on them. After several continuances, the probate court stated an *ex-parte* account against them on the 21st January, 1857, which was alleged to be full of errors and mistakes; and the proceed-

ings were at that stage when the bill was filed, on the 7th September, 1857.

The chancellor sustained a demurrer to the bill, for want of equity, and his decree is now assigned as error.

GEO. W. GUNN, for appellants.

M. ANDREWS, *contra*.

STONE, J.—In this case, the probate court of Chambers had acquired jurisdiction of the settlement of the administration, and had taken some steps therein; and, unless this case be characterized by some special equities, one party had no right, against the objection of the other, to transfer the settlement to another court of concurrent jurisdiction.—*Moore v. Lesueur and Wife*, 33 Ala. 237, and authorities cited. We have looked into this record, and are unable to perceive any special reasons why the settlement of the administration should be transferred to the chancery court.

Without considering, in any manner, the other points made in argument, or commented on in the decree of the chancellor, the decree dismissing the complainants' bill is, on the ground above considered, affirmed.

WITTER vs. DUDLEY.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Character and duration of trustee's estate under decree in chancery*.—Under a decree in a chancery suit, making partition of the estate of the complainant's deceased father among the distributees; settling the portion of the complainant, who was then a married woman, on a trustee, for her sole and separate use during life, with remainder to her children living at her death; appointing a trustee for her, and requiring that he "shall give bond, with surety, conditioned that he will account and pay over to the said Mary", [complainant,] "and to no one else, all such sums of money as he may

receive as trustee as aforesaid, (such bond to be in double the value of the personal estate, and double the annual income of the real estate,) and that he will faithfully perform the duties of a trustee, and will abide and perform such order and decree as the court may make touching the said trust estate",—the legal title is vested in the trustee until the termination of the life-estate, and is not devolved upon the *cestui que trust* by the death of the trustee before that time.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by Mrs. Mary D. Lamkin, against John Dudley, "to recover the following tract of land: the west half of the north-west quarter of section 29, the south-west quarter of section 20, the south-east quarter of section 19, the north-east quarter of section 29, and the south-east quarter of section 20; all in township 15, range 14, in the county of Lowndes." The plaintiff having married one Francis R. Witter, pending the suit, her marriage was suggested on the record, (Code, § 2150,) and the suit proceeded in her name acquired by the marriage. The plaintiff was the daughter of one Francis Lewis, deceased, to whom the lands in controversy belonged at the time of his death; and claimed said lands under a decree in chancery, rendered in December, 1843, which is hereinafter more particularly described; while the defendant derived title under a conveyance from one Hamlin F. Lewis, executed in 1852, and was in possession at the commencement of the suit, in February, 1858.

The plaintiff offered in evidence on the trial a transcript of the chancery suit, which is made an exhibit to the bill of exceptions, and which shows the following proceedings: The bill was filed in the chancery court of Lowndes, on the 15th December, 1842, by Mrs. Mary D. Lamkin, then the wife of John B. Lamkin, against her said husband, and the heirs-at-law and distributees of her deceased father, Francis Lewis; and sought—1st, to set aside a voluntary division of the estate, which had been made by the parties interested while the complainant was

an infant; 2d, to enjoin her husband from the further prosecution of proceedings in the probate court to obtain her distributive share of the estate; 3d, to have a partition and division of the estate made by commissioners under the order of the chancellor; and, 4th, to have the complainant's portion of the estate settled on a trustee, to be appointed by the court, for her sole and separate use during her life, and at her death to her children. At the December term, 1842, after all the defendants had filed answers, admitting the material allegations of the bill, the chancellor (Orenshaw) rendered a decree, enjoining the proceedings in the probate court, setting aside the voluntary division of the estate, appointing commissioners to make partition anew, and ordering that "the portion of said estate to be allotted to the said Mary D. Lamkin be settled on trustees, to be appointed by the master, for the sole and separate use and benefit of the complainant during her life, and at her death to her heirs." At the December term, 1843, the commissioners made their report, and the master reported his appointment of Hamlin F. Lewis as trustee for the complainant; and the chancellor thereupon rendered a final decree, confirming the reports, and making partition of the estate. The only part of this decree which it is necessary to notice, relates to Mrs. Lamkin's share of the property, and is in the following words:

"It is further ordered and decreed, that the following slaves", (specifying them by name,) "and the following lands", (to-wit, the lands in controversy in this suit,) "be vested in Mary D. Lamkin, wife of John B. Lamkin, and daughter of the said Francis Lewis, deceased. And it is hereby further ordered and decreed, that the portion so vested in the said Mary D. Lamkin be vested and held by her, to and for her sole and separate use, for and during the term of her natural life, not subject to the debts, contracts, or forfeitures of the said John B. Lamkin; and after the death of the said Mary D. Lamkin, the said portion of lands and the slaves, with their future increase, to be equally divided among such child or children as the said Mary D. Lamkin may leave living, share and share

alike,—the child of any deceased child to take among them the share which their ancestor would have taken, had such ancestor been alive at the death of the said Mary D. Lamkin; and upon the death of the said Mary D. Lamkin without leaving such child or children, or their issue, alive as above, then such portion of the said Mary D. Lamkin to vest in the said John B. Lamkin, her husband, but not otherwise. It is further ordered and decreed, that Hamlin F. Lewis be, and he is hereby, appointed trustee for the said Mary D. Lamkin; that he shall give bond, with good security, to the register of this court, conditioned that he will account and pay over to the said Mary D. Lamkin, and to no one else, all such sums of money as he may receive as trustee as aforesaid, (such bond to be in double the value of the personal estate, and double the annual income of the real estate,) and that he will account annually to this court, and that he will faithfully perform the duties of a trustee, and that he will perform and abide such order and decree as the court may make touching the said trust estate.”

“It was admitted,” the bill of exceptions states, “that no deeds of settlement were ever executed by the said John B. Lamkin and his wife, or either of them, as contemplated by the decree in said chancery suit; also, that Hamlin F. Lewis never executed any bond, or other obligation, for the discharge of his duties as trustee under said chancery decree; also, that said John B. Lamkin removed to Mississippi, in 1848–9, carrying with him the plaintiff and the slaves allotted to her under said chancery decree, and there died, in 1856; also, that Hamlin F. Lewis left this State in 1858, and died in Texas during that year.”

“The court charged the jury, that under the decree and proceedings in chancery, and the evidence in the case, the legal title to the lands sued for was in Hamlin F. Lewis, and that the plaintiff could not maintain this action in her own name; to which charge the plaintiff excepted, and thereupon took a nonsuit”; and she now assigns as error the charge of the court, and moves to set aside the nonsuit.

THOS. WILLIAMS, for appellant.

BAINE & NE SMITH, *contra*.

A. J. WALKER, C. J.—The decree of Chancellor Crenshaw first creates a separate estate for life in the appellant, then appoints a trustee for her, and requires that he shall give bond, with surety, conditioned to account and pay over to her, and to no one else, all *such* sums of money as he may receive as trustee, and that he will account annually with the court, and faithfully perform the duties of trustee, and abide by and perform such order as the court may take touching the *trust estate*. The decree farther requires, that the penalty of the bond should be double the value of the personal estate, and double the value of the income of the real estate. In considering whether this decree vested the legal estate in the trustee, it is proper to observe, at the outset, that the appellant was, at the date of the decree, a married woman.

Where by any instrument a separate estate is given to a *feme covert*, and a trustee is appointed, an established rule of construction requires the courts to strive to so construe it as to exclude the husband from the reception of the legal title, and to vest it in the trustee.—Ware v. Richardson, 3 Md. R. 505, 549; Hill on Trusts, 232, 407; Harton v. Harton, 7 Term, 652; Williman v. Holmes, 4 Rich. Eq. 480; McNish v. Guerard, 4 Strob. 75. It is also an established principle, that the trustee takes the legal title, whenever it is necessary to enable him to discharge the duties imposed upon him; and such necessity exists, when a trustee is required to take and pay over the rents and profits to the *cestui que trust*.—Hill on Trusts, 232, 233, 234; Ware v. Richardson, *supra*; Brewster v. Striker, 2 Comst. 30–37; Morton v. Barrett, 22 Maine, 263; Porter v. Doby, 2 Rich. Eq. 49–53; McNish v. Guerard, 4 Strob. 74; Bass v. Scott, 2 Leigh, 359; Franciscus v. Reigart, 4 Watts, 109. Guided by these rules of construction, we conclude, that the decree of the chancellor, by requiring a bond, conditioned that the trustee shall account for and pay over whatever he may receive as trustee,

and shall account annually with the court, and by characterizing the estate, in the last part of the prescribed condition of the bond, as a trust estate, indicates a clear design to impose upon the trustee the duty of receiving and paying over the income of the estate; and that, having this duty imposed upon him, he takes the legal title.

A trust terminates, whenever its purposes have been accomplished. The language which creates the trust in this case, indicates a design to make its duration co-extensive with the life-estate. The trustee is appointed trustee for Mrs. Lamkin. We are not authorized to add a new limitation, by making him trustee for Mrs. Lamkin during coverture. The purposes of the trust will not be accomplished, until the life-estate terminates.—*Peake v. Yeldell*, 17 Ala. 636; *Comby v. McMichael*, 19 *ib.* 751; *Gunn v. Barrow*, 17 *ib.* 747; *Powell v. Glenn*, 21 *ib.* 468; *Hill on Trusts*, 239. The death of the trustee does not invest the *cestui que trust* with the legal title.—*Colburn v. Broughton*, 9 Ala. 364.

The judgment of the court below is affirmed.

POWELL vs. ASTEN.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Error without injury in rulings on pleadings.*—The wrongful sustaining of a demurrer to a special plea, when the defendant might have had the benefit of the same defense under his other pleas, is, at most, error without injury.
2. *When exception is necessary.*—The refusal of the circuit court, on sustaining a demurrer to a plea, to allow the defendant leave to plead over, is not revisable on error, unless an exception was reserved to it.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by Robert Y. Asten, against Elizabeth R. Powell, and was founded on the defendant's promissory note for \$425, dated the 10th September, 1857, and payable on the 25th December next after date. The defendant pleaded, in short by consent, non-assumpsit, want of consideration, and failure of consideration; and a special plea, which averred that the note was given for the amount found due from the defendant on an award, and stated the facts connected with the arbitration and award. The court below sustained a demurrer to this special plea, and refused leave to the defendant to plead over; and its rulings in these two particulars are here assigned as error. There is no bill of exceptions in the record.

A. B. CLITHERALL, for appellant.

T. REAVIS, *contra*.

R. W. WALKER, J.—If it be conceded that the special plea, the demurrer to which was sustained, contained substantial matter of defense to the action, it is clear that the facts alleged might have been given in evidence under the other pleas filed by the defendant. There was, therefore, no error of which the appellant can complain, in sustaining the demurrer.—Rodgers' Adm'r v. Brazeale, 34 Ala. 512, and cases there cited.

2. It is not shown that the defendant excepted to the action of the court, in refusing leave to plead over. He cannot, therefore, assign it as error in this court.

CHARLES vs. MILLER.

[BILL IN EQUITY FOR DISSOLUTION AND SETTLEMENT OF PARTNERSHIP.]

1. *Agreement of counsel, for entry of decree by consent, enforced against party.*
Under a bill for the dissolution and settlement of a mercantile partnership, a written agreement between the counsel of the respec-

tive parties, stating the terms of a decree to be entered up by consent, held to have been properly enforced by the chancellor, against the objection of one of the parties, supported by his own affidavit, on the ground of errors and mistake; the affidavit being controverted by the oath of the opposite party, and no evidence being adduced in support of it.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by William Miller, against David Charles, asking the dissolution and settlement of a mercantile prrtnership then existing between them, and the appointment of a receiver to take charge of the partnership business in the meantime. The defendant filed an answer, admitting the necessity for a dissolution and settlement, and concurring in the prayer of the bill; and the chancellor then made a decretal order, appointing as receiver a person selected by the parties, and referring the matters of account to the master. The master reported at the next term, that the parties and their solicitors appeared before him, on the day appointed for stating the account, "and consented that he should be relieved from executing the order of reference, and, in lieu thereof, should report a decree as agreed on by consent of parties." The decree and agreement referred to, which were made a part of the report, were as follows:

" William Miller	}	In Chancery: Eighteenth District,
vs.		Middle Chancery Division, of the
David Charles.		State of Alabama.

"By consent of the parties to this cause, it is ordered, adjudged, and decreed, that the said William Miller pay to the said David Charles the sum of \$963 36; upon the payment of which sum, all the assets of the firm of Miller & Charles, both in the hands of the receiver appointed by this court, and in the hands of the said David Charles, if any, be delivered over to the said William Miller, to be held by him as his own property; that upon such payment and delivery, all the said partnership transactions between the said parties be considered as finally closed and settled, and the individual accounts of said parties

to said firm canceled, as well as the amounts which may be due from the said David Charles to the receiver in this cause, for goods sold; that the said William Miller pay the note to James G. Harris, the indebtedness of the firm for patent medicines, and its indebtedness to the post-office department; and that this decree be a lien on the assets of said firm in the hands of said receiver, for the payment of said sum of \$963 36, by said William Miller. It is further ordered and decreed, that this cause be referred to the register of this court, to inquire and report, at the present term, what would be a proper compensation to the receiver, and the amount of all the other costs in the cause; and that when the same shall be reported, each party shall pay one-half of all the costs, including compensation to the receiver,—for which several amounts execution may issue.

“It is agreed by the parties in the above entitled cause, that the register be relieved from executing the order of reference in said cause, as directed by the decree pronounced at the February term, 1859, and, in lieu thereof, report the foregoing decree as agreed upon by consent of parties; and that the same be entered as the decree of the court, at the next term thereof.”

(Signed by the counsel of both parties.)

At the term to which the master's report was made, the defendant filed his petition, supported by his own affidavit, alleging and specifying several errors and mistakes in the estimates and calculations on which the terms of the consent decree were based, and asking that the report and decree might be set aside. The complainant filed an answer to this petition, denying the existence of the alleged mistakes, and appending to his answer an affidavit of its truth. The court thereupon rendered a decree, overruling the defendant's motion, confirming the master's report, and ordering the enrolment of the decree by consent; and this decree, which is here assigned as error, recites that no other evidence than the affidavits of the parties was adduced before the chancellor on the hearing of the defendant's motion.

S. W. COCKRELL, for the appellant, cited 1 Greenl. Ev. 206; Harvey v. Thorpe, 28 Ala. 250; Rosenbaum v. The State, 33 *ib.* 362; Beach v. Shaw, 4 Barbour, 288.

S. F. HALE, *contra*.

A. J. WALKER, C. J.—There can be no doubt of the power of a court to carry into effect the solemn and formal and written agreements of counsel, in reference to proceedings in the causes which they represent.—Harvey and Wife v. Thorpe, 28 Ala. 250; Starke & Moore v. Kennan, 11 *ib.* 818; Rosenbaum v. State, 33 *ib.* 362; *Ex-parte* Lawrence, in manuscript. Indeed, the Code (§ 743) expressly provides, that “an attorney has authority to bind his client, in any action or proceeding, by any agreement in relation to such cause, made in writing, or by an entry to be made on the minutes of the court.”

The question, whether it is not the duty of the court, where an agreement of counsel has been made improvidently or by mistake, or has been procured by fraud, to withhold an enforcement of it, does not belong to this case. The facts stated in the appellant's petition as reasons for setting aside the agreement, supported by his affidavit, were controverted by the answer of the adverse party, also supported by affidavit. The petition for setting aside the agreement, and the report based upon such agreement, being thus denied, it devolved upon the petitioner to sustain his assertion of facts by proof; and, as he did not do so, the chancellor properly disregarded the petition. It would have been improper for the chancellor to have acted upon the supposition that the agreement had been made improvidently, or by mistake, when there was no evidence of the fact, save the appellant's own affidavit, which was controverted by that of the opposite party. There was no error committed by the chancellor in not making a reference of the questions of fact to the register, or in not continuing the case to afford an opportunity for taking testimony, when neither of those things was asked by the appellant.

The decree of the court below is affirmed.

McLAUGHLIN vs. McLAUGHLIN.

[BILL IN EQUITY FOR INJUNCTION OF JUDGMENT AT LAW.]

1. *What is revisable on error.*—On appeal from a decree in chancery, dissolving an injunction on the denials of the answer, without passing on the equity of the bill, the appellate court will only consider the single question decided by the chancellor.
2. *Refunding bond.*—When an injunction of a judgment or action at law is dissolved by interlocutory decree, the defendant must be required to give a refunding bond, as prescribed by section 2982 of the Code.

APPEAL from the Chancery Court of Perry.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by John R. McLaughlin and Samuel G. McLaughlin, Jr., against Samuel G. McLaughlin, Charles McLaughlin, George McLaughlin, and Samuel Whitman. Its object was, to enjoin a judgment, which said Samuel G. McLaughlin, as the executor of the last will and testament of John McLaughlin, deceased, had obtained against said Samuel G. McLaughlin, Jr., on a promissory note executed by the latter as the surety of James McLaughlin, deceased; and an action at law, founded on the same note, which said Samuel G. McLaughlin had instituted against said John McLaughlin, as the administrator of said James McLaughlin, deceased; also, to set off the amount due on this note against the distributive interest of the said James McLaughlin, deceased, in the estate of said John McLaughlin, deceased, and, to that end, to have the administration of said estate settled in the chancery court. The bill alleged, that said note was given for property bought by James McLaughlin, at a sale made by said Samuel G. McLaughlin, as executor of said John McLaughlin; that said James McLaughlin was induced by said executor to become the purchaser of this property, under the promise that it should be paid out of his interest as a distributee in the estate; and that

said note was signed by said Samuel G. McLaughlin, Jr., as the surety of said James, under a similar promise by the executor. Charles and George McLaughlin were distributees of the estate of said John McLaughlin, deceased; and Samuel Whitman was joined as a co-defendant with them, on the ground that he had purchased the distributive interest of said Charles, and had afterwards sold and transferred it to said Samuel G. McLaughlin.

Samuel G. McLaughlin answered, denying the allegations of the bill, as to the promise and representations under which the property was bought by James McLaughlin, and the note for the purchase-money signed by said Samuel G. McLaughlin, Jr.; but admitting all the other material averments. After filing this answer, he moved to dissolve the injunction, as well for want of equity in the bill, as on the denials contained in the answer. The chancellor dissolved the injunction, in vacation, without deciding on the equity of the bill, and without requiring a refunding bond; and his decree is now assigned as error.

J. R. JOHN, for appellants.

I. W. GARROTT, *contra*.

STONE, J.—The chancellor declined to pass on the equity of the bill; and, under the circumstances, we think it our duty to do likewise. Had the chancellor expressed any opinion on the frame of the bill, or its equities, motions and applications might have been urged before him, which we, as an appellate court, are incompetent to pass on.

We agree with the chancellor, that the answer contains a full and complete denial of every averment in the bill on which its claim to relief can be made to rest. He, therefore, did not err in dissolving the injunction.

The defendant had a judgment at law, which under the bill in this case was enjoined. In dissolving the injunction, the chancellor should have required the defendant to execute a refunding bond, under section 2982 of the Code. For failing to do so, his decretal order dissolving the injunction is reversed; and this court, proceeding to

make such an order as the chancellor should have made, doth hereby order and decree, that the injunction heretofore granted in this cause, be dissolved, on the defendant entering into bond, payable to, and approved by the register in chancery, for the chancery court in and for Perry county, in the terms prescribed by section 2982 of the Code.

Let the costs of this appeal be paid by the appellee.

SWIFT vs. SWIFT.

[BILL IN EQUITY TO ESTABLISH ABSOLUTE BILL OF SALE AS MORTGAGE; FOR REDEMPTION, AND ACCOUNT.]

1. *Contract held conditional sale, and not mortgage.*—A written instrument, signed by the defendant, reciting that he had *purchased* from the complainant several slaves, specifying the name and separate value of each, and then stipulating that, if the complainant “shal redeem, or cause to be redeemed, any part of said negroes within seven years”, the defendant would make a specific deduction from the value of each,—whether considered by itself, or in connection with an absolute bill of sale, executed on the next day, which acknowledged the receipt of the money in full payment for the slaves, and contained a warranty of soundness and title, is a conditional sale, and not a mortgage; nor will a court of equity declare the contract to be a mortgage, on proof that the complainant at first applied to the defendant for a loan of money, or other pecuniary aid—that the defendant declined to loan money, but made another proposition in reply, to which the complainant did not accede; and that by the arrangement finally concluded between them, the defendant assumed a large debt due from the complainant to a third person, took the negroes at the prices specified in the writings above mentioned, and received from the complainant his several promissory notes for the difference between the aggregate price of the slaves and the amount of the assumed debt; there being no proof of fraud, imposition, or unfairness, nor any great disparity between the value of the slaves and the price agreed to be paid.
2. *Variance between allegations and proof; sufficiency of tender.*—Under a bill which alleges that a contract for the sale of slaves was a mort-

gage, and prays for a redemption and account, if the evidence shows that the contract was a conditional sale, there is a fatal variance between the allegations and proof; nor could a redemption be decreed, when the only tender alleged in the bill was coupled with a demand for hire which, under the contract, the defendant had a right to refuse.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 24th March, 1855, by Theodorick Swift, against his brother, Wiley P. Swift, and alleged, that the complainant, being largely indebted, and unable to meet his liabilities without a sale of his property, applied to his brother for pecuniary assistance; that the latter responded to his application, by letter dated the 10th January, 1850, (which was made an exhibit to the bill,) "proposing to aid him on condition that complainant would give him the control of his property"; that on the 3d March, 1850, "in conformity with the proposition evinced in said letter, and in consideration of the assistance of said Wiley P. Swift, by loan of his name to complainant, to raise the sum of \$12,505," complainant executed and delivered to defendant a bill of sale for seventeen slaves; that the defendant executed and delivered to complainant, on the same day, "as a condition and qualification in writing to the said bill of sale," a written instrument acknowledging the defendant's right to redeem the said slaves, on the terms therein specified, at any time within seven years; that this agreement and the bill of sale "are parts of the same contract, and have reference to the same slaves, and the money loaned by Wiley P. Swift to complainant was by virtue of these writings"; that, "in addition to the security given by said slaves and bill of sale," complainant executed to said defendant his three promissory notes, for the aggregate amount of \$4,305, due the 1st March, 1851, 1852, and 1853, respectively; that defendant "never did advance or pay to complainant the said sum of \$12,505, but executed his note for that amount to one Thompson, to whom complainant was indebted, and required complain-

ant to become his surety on said note"; that the defendant has had the use and possession of the slaves since the time when said contract was made, and now claims to hold them as his own; and that the complainant has demanded the slaves, and offered to pay whatever balance might be found due to the defendant on a settlement of their accounts, after deducting the reasonable hire of the slaves while in the defendant's possession. The prayer of the bill was for a redemption and account, the cancellation of the notes and bill of sale, and general relief.

The letter of the 10th January, 1850, (omitting the immaterial portions,) was as follows: "After receiving and reading your letter, I feel much for your situation, particularly on account of your children. But you are mistaken as to think I am out of debt and able to help you. It will be a tight squeeze for me to get through with my payments, on account of only making a half crop. But I will make you a proposition, and it is the only one I will do, after deliberately considering your case. If you do not owe more than twelve or fourteen thousand dollars, and Thompson will see proper to make the amount in three payments,—twelve months to the first payment, which is as soon as I can make it; and you are disposed to give me control of your property, and let me bring your negroes to Alabama, to be entirely under my control and management, leaving you a fine house [and] servants—Either rent or sell your good plantation, as you call it, making thirty bales of cotton a year. I have either more land than I can cultivate, and can clear enough by planting time to make more than your farm will make; and if I can't have land enough, I will hire out a part of your negroes, and will pay your debts, and hold your property until I consider that I have made the amount, and save the property for your children, if I don't for you. If it is necessary that a payment of cash is to be made, I will say, Berry Burton can raise the amount from — estate, which amount I will become responsible for; so, if Berry have any feeling or disposition to save your property for your children, they can help. You can show this letter to Thompson; and if this arrange-

ment will do, write immediately, and I will put my hands to clearing, and bring a wagon or two, if necessary, to move your negroes. I will not involve myself, unless I have the entire control of your property, and that at home; for I have no confidence in your plantation, and it is too far from home. But, if my propositions do not suit you, and you find you will have to sell a part of your property, it is a very favorable time for good prices", &c.

The writing signed by the defendant, containing the stipulation as to the redemption of the slaves, which was also made an exhibit to the bill, was in the following words:

"State of Mississippi, } Articles of agreement between
 Noxubee county. } W. P. Swift and Theod. Swift,
 as follows: W. P. Swift having purchased from Theod. a lot of seventeen negroes—say, Edmund, valued at \$850; his wife, Susan, valued at \$600; boy Jack, at \$400; Martha, valued at \$300; Stephen, at \$200; Mary, \$200; Fennel, \$150; and child Handy, \$100,—amount of the family, \$2,800; July and child, \$750; Chloe, \$600; Olive, \$650; Nicodemus, \$700; Elijah, \$450; Clark, \$750; Joe, and his wife, Mary, valued at \$1,500—if said Theod. Swift shall redeem, or cause to be redeemed, any part of said negroes within seven years, I will deduct fifty dollars from the value of each grown hand, according to the above named prices; and the young negroes can be redeemed, within two years at least, with the father and mother; if not in two years, to be redeemed at what they may be valued at, allowing for the growth of them; and if the above named negroes are not redeemed in seven years, the above obligation will be null and void. March 3, 1850.

W. P. SWIFT."

The defendant answered the bill, admitting the complainant's alleged application to him for pecuniary assistance, and his response by letter to that application; alleging that the complainant did not accept the proposition made in said letter, and that it had no connection with the contract afterwards entered into between them; admitting his execution of the writing dated the 3d March, 1850, but insisting that it was void as a contract,

because executed on Sunday; and alleging that he acquired and held the slaves under an absolute purchase from the complainant, as shown by his bill of sale, dated the 4th March, 1850, which was made an exhibit to the answer. This bill of sale is in the usual form—acknowledges the receipt of \$8,200, “in full payment for seventeen negroes”, (the names and ages of which are specified,) and contains a warranty of soundness and title. The defendant further alleged in his answer, that the amount specified in the bill of sale, as the price of the negroes, was paid by his assuming a debt of \$12,500, due from the complainant to one Thompson; and that the complainant executed to him his four (not three, as stated in the bill) notes for the difference between the two sums.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without prejudice to the institution of an action at law, or the filing of a bill to compel the specific execution of the contract dated the 3d March, 1850; and his decree is now assigned as error.

ALEX. & JNO. WHITE, for appellant.

WM. M. BYRD, *contra*.

R. W. WALKER, J.—1. Whether the instrument executed by the defendant on the 3d March, 1850, be considered by itself, or in connection with the absolute bill of sale executed by the complainant on the next day, it is not, either in form, or in legal effect, a mortgage, but shows a sale of the slaves by the complainant to the defendant, with the right secured to the former to repurchase all or any of them, within the period, and on the terms specified in the first named writing. But a contract, which is in form a conditional sale, will be treated as a mortgage, if it is shown by parol evidence that the object of the transaction, as understood by both parties, was to create a security for a debt: and in every case, where the question to be determined is whether a particular transaction is to be considered a sale (either absolute, or conditional) or a mortgage, this is the turning-point of the inquiry. For a mortgage is essentially a security for a debt; and

the rule is without exception, that when no debt exists, a mortgage is impossible. It is a necessary ingredient of a mortgage, that the mortgagee should have a remedy against the person of the debtor. There can be no right of redemption on one side, unless there be the right of foreclosure on the other.

In the present case, the evidence which is set out in the record fails to satisfy us that the object of this transaction, as understood by both parties, was to create a security for a debt. As to the \$8,200, the consideration paid for these negroes, it is not shown that the complainant remained under any obligation, express or implied, for its repayment to the defendant. On the contrary, the inference is unavoidable, that the arrangement which the parties made did not create the relation of debtor and creditor between them, except to the extent of the difference between the agreed price of the slaves, and the amount of the debt which the defendant assumed for the complainant. For this difference, the complainant executed to the defendant his four notes, as testified to by the witness Goodwin; but for the \$8,200, the price at which the negroes were taken, no note, or other evidence of indebtedness, was given. If the defendant, upon such evidence as is set out in this record, had either brought an action at law against the complainant for the recovery of the \$8,200, the agreed price of these slaves, or filed his bill praying a sale of the slaves, the application of the proceeds to the repayment of the purchase-money, and a decree against the complainant for whatever balance might still remain due, it is clear that he must have failed in the suit.

It is true that the contract seems to have had its origin in, or rather to have been preceded by, a proposition for a loan; and this, it is well settled, is a circumstance which strengthens the inclination which, in cases of doubt, courts always feel, to consider the transaction a mortgage, rather than a conditional sale. For some reason which does not appear, the proposition which the defendant made by letter, in answer to the complainant's appeal for aid, was not acceded to; and the arrangement which was

finally made, was altogether different, in substance as well as in form, from that which the defendant at first proposed. This first proposition clearly contemplated, that all of the negroes of the complainant were to be transferred to the defendant, solely for the purpose of securing the latter against liabilities to be incurred for the benefit of the complainant; while, on the other hand, the arrangement finally concluded between the parties, so far as it relates to the seventeen slaves named in the two writings, was neither a loan of money, nor the creation of a debt, but a sale of the negroes for a consideration then given—namely, the discharge by the defendant of liabilities of the complainant, amounting to \$8,200; that being the sum agreed upon as the aggregate value of the slaves. The stipulation securing to the complainant the right to redeem any *part* of the slaves, within the period designated, is a strong circumstance to show that the transaction was a conditional sale, and not a mortgage. The making of the first proposition certainly did not deprive the defendant of the right afterwards to negotiate for and acquire the absolute title. This he appears to have done, in good faith. There was no such disparity between the value of the slaves, and the price paid, as to cast suspicion on the transaction; nor do we find any evidence showing that the defendant was guilty of fraud, imposition, or unfairness.

Under all the circumstances disclosed in the record, we must treat the transaction between these parties, not as a mortgage, but as a conditional sale, the terms of which are set forth in the writing executed on 3d March, 1850.—*Eiland v. Radford*, 7 Ala. 726; *Sewall v. Henry*, 9 *ib.* 24; *Murphy v. Barefield*, 27 *ib.* 634; *West v. Hendrix*, 28 *ib.* 234; *Sewell v. Price*, 32 *ib.* 97; *Crews v. Threadgill*, at the last term; *White & Tudor's Lead Cases Eq.*, vol. 2, pt. 2, 431–442, and cases there cited.

2. If it be conceded, that a court of chancery would take jurisdiction of a bill for the specific performance of the defendant's contract to resell all or any of the slaves on the terms set forth in the writing executed by him, it is clear that the complainant has no right, under this bill,

to any such relief. In the first place, the bill alleges, that the contract between the parties was a mortgage, not a conditional sale; whereas it was, in fact, a conditional sale, and not a mortgage. The contract proved is, therefore, not the contract alleged. In the second place, the defendant would not, under the contract, be chargeable with the hire of the slaves; and as the only offer to redeem, alleged in the bill, is one which was coupled with a demand for hire, and which, therefore, the defendant had the right to refuse, it follows, that the complainant shows no right to relief founded on the contract.—*Murphy v. Barefield*, 27 Ala. 634; *Farrelly v. Robinson*, 16 *ib.* 472; *Casey v. Holmes*, 10 *ib.* 777; *Bell v. Thompson*, at the last term; *McLeod v. Powe*, 12 Ala. 9.

Decree affirmed:

STARKE vs. BLACKWELL AND WIFE.

[BILL IN EQUITY TO SUBJECT WIFE'S SEPARATE ESTATE TO PAYMENT OF NOTE.]

1. *Proof of execution of note.*—The issue in this case being, whether the *feme covert* defendant executed the promissory note which was sought to be charged upon her separate estate, and which purported to be signed by her, jointly with her husband; one witness expressing the opinion that her signature was genuine, while four other witnesses testified, that the handwriting, though closely resembling the defendant's, was not hers; and the evidence showing that, when the note was handed to the husband, and he was required to procure his wife's signature, he went with it towards the room occupied by himself and wife, and returned with her name signed to it,—*held*, that the evidence was not sufficient to overcome the sworn denial of the answer.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Thomas Starke, against Mrs. Sallie Blackwell and F. M. Blackwell, her husband;

and sought to enforce payment, out of Mrs. Blackwell's separate estate, of a promissory note which purported to have been signed by her, jointly with her former husband, Joseph Cone, and others, and which was given for the hire of slaves. Mrs. Blackwell denied in her answer that she ever signed the note, or authorized any one else to sign it for her; and pleaded that fact in bar of the suit. The opinion of the court contains a sufficient statement of the evidence bearing on this controverted question of fact. On final hearing, on pleadings and proof, the chancellor held the evidence insufficient to overcome the denials of the answer, and therefore dismissed the bill; and his decree is now assigned as error.

GEO. W. GAYLE, for appellant.

BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—The purpose of this suit is, to charge the separate estate of the *feme covert*, who is a defendant, with the payment of a promissory note, alleged to have been executed by her during a former marriage, the bonds of which were severed by divorcement. The execution of the note by the defendant is denied in a sworn answer, there being no waiver of the oath by the complainant. The chancellor, deeming the testimony insufficient to overcome the denial of the answer, dismissed the complainant's bill. Avoiding the intimation of an opinion upon any other point in the case, we decide, that the chancellor's view of the testimony was correct, and, upon that ground, affirm his decree.

Protracted discussions of evidence, by an appellate court, are generally unnecessary and unprofitable, and should be avoided. They usually occupy space in the books of reports, without announcing any legal principle, or affording precedents for the adjudication of other cases. But, as this case is of considerable importance, and the question of fact upon which it hinges is one of intrinsic difficulty, and the counsel evidently have a full conviction of right upon their respective sides, it seems due to the court that its decision should be vindicated by a brief statement of the reasoning which has led to it.

There are five witnesses, (Rainer, Lodor, Craig, Perrine, and Hatcher,) who give testimony of their opinion as to the handwriting of the defendant's name. One of these witnesses (Rainer) expresses an opinion, that the handwriting is the defendant's; while the other four express the contrary opinion. From the testimony of Lapsley we learn, that after the note was signed by Cone, the defendant's husband, and delivered to one of the complainant's agents, it was returned to Cone, with the exaction that he should procure his wife's signature; and that he took the note, went towards the room occupied by himself and his wife, and returned in a short time, with her name to the note. These facts fall far short of demonstrating the execution of the note by the defendant; because it neither appears that Cone, while he was absent with the note, went into his room, nor, if he did, that his wife was there, or that he saw her at all. These facts show, that the name of the defendant was affixed at a time different from that at which her husband signed his own name, and afford a refutation of the argument, that because Cone's own signature indicates that he was too drunk to have committed a forgery at the time when he signed his own name, he must have been drunk and incompetent to have imitated his wife's signature at the time when her name was affixed to the note. But the important deduction from those facts is, that Cone had an opportunity, unobserved, to sign his wife's name to the note, and that no other person had such opportunity. It is proper also to observe, just here, that Cone is proved to have been an expert pensman; and the inference is legitimate, that he was familiar with his wife's handwriting. From the premises above stated it is a necessary inference, that either the defendant herself signed her name, or that her husband, an expert pensman, and familiar with her handwriting, signed her name, imitating her handwriting. With the latter of these alternative propositions, the testimony of all the five witnesses, who give their opinions as to the handwriting, harmonizes.

Several of these five witnesses say, that the name of the defendant as written bears a striking resemblance to her

handwriting, and that they would not probably have suspected its genuineness, had it not been disputed; but, being invited to a scrutiny of the handwriting by the controversy as to the genuineness of the signature, they are enabled to discover differences from the formation of the letters and the character of the marks, peculiar to the writing of the defendant, which lead to the opinion that the signature is not genuine. Upon the supposition that the defendant's name was written by her husband, and her handwriting imitated, we would look for just what we find in this case,—a failure on the part of as many as one-fifth of those not peculiarly skilled in judging of handwriting to detect the forgery, and a detection by the others only after they had been led to make a scrutinizing examination. Therefore, the fact that one witness, out of five, thought the name to be in her handwriting, and that the others attained a different conclusion only after a close examination, proves merely that there was a striking resemblance, and is consistent with the supposition of a skillful forgery. Indeed, it is precisely what may always be expected where there is an ingenious forgery.

There are other facts in proof, which we proceed to notice, tending to support the testimony of the four witnesses, who express the opinion that the name of the defendant is not in her handwriting. The differences shown to have existed between the signature to the note and the defendant's accustomed writing, are such as would be likely to occur in an attempt by a man, handling the pen expertly, to imitate the handwriting of a lady who (as we infer was the case with the defendant) did not write a great deal, and was not expert in writing. One of the witnesses (Warford) testifies, that there is a resemblance in the writing of the defendant's name to the handwriting of Cone. Lapsley, another witness, shows that Cone desired the note to be taken without the signature of his wife, and at first delivered it without her signature. From this testimony it is a legitimate inference, that Cone was reluctant to ask his wife's signature; either because he felt a delicacy in doing so, or because he apprehended a

refusal on her part; and there was, therefore, a motive for his affixing her signature without her consent. We thus have the opinions of four witnesses, that the defendant's name is not in her handwriting, corroborated by other facts, and opposed by no greater conflict of opinion, than will probably always be found in cases where signatures have been forged with any degree of skill.

To overcome the strong case thus made out for the defendant, the complainant has the testimony of the witnesses Taylor and Sims, as to the defendant's declarations not yet noticed. To the declarations proved by Taylor we attach but little importance. It is neither unreasonable, nor unusual, that a married woman should speak of her husband's debt as a burden common to him and herself. The defendant has attempted to assail the character of the witness Sims; but it must be conceded to the complainant, that the attempt was ineffectual, and that we are not justified by the evidence in refusing to credit his testimony on the score of bad character. We will not attempt to reconcile the declarations, proved by this witness, with the other testimony, or with the supposition that the defendant did not execute the note. If the declarations were made, without any qualification, precisely as they are stated by the witness, they would weigh very heavily against the conclusion that the defendant did not execute the note. But, in determining what influence should be conceded to these declarations, it is proper to consider that they are proved after the lapse of several years; that they appear to have been made incidentally, in a conversation having reference to the mistreatment of the defendant by her husband and its cause; that they were not made with any deliberation, or with any view to their effect as evidence against the declarant; that they were not addressed to the witness, and did not concern him in any way; that there seems to have been nothing to impress the precise language used upon the memory of the witness; and that the witness professes most strangely to have forgotten who were present, and to whom the conversation was addressed, and thus indicates, either a frailty of memory, or an intention to so shape

his testimony as to avoid contradiction or explanation. To these must be added the farther consideration, that the nature of the declarations is such that a very slight alteration of the language, either from imperfection of memory, misapprehension, or design, might change their effect. Declarations, made and proved under such circumstances, should be received with caution, and they must weigh with a heaviness largely diminished, on account of the considerations above stated, in the scales against opposing evidence.—Garrett v. Garrett, 29 Ala. 439.

We have noticed all the evidence in this case, which has an important bearing upon the point of controversy. It is incumbent upon the complainant to sustain the allegation denied, by what would be at least equivalent to the positive proof of one witness, supported by corroborating circumstances. After allowing to the defendant's testimony its proper effect, in contradicting and neutralizing the complainant's, we are forced to the conclusion, that if the balance of proof is not on the defendant's side, the complainant is at least left without the measure of proof necessary to overcome the denial of the answer.

The chancellor's decree is affirmed.

COLEMAN vs. CAMP.

[BILL IN EQUITY BY ADMINISTRATOR FOR ACCOUNT AND RECOVERY OF PROPERTY.]

1. *Bequest construed to create life-estate in widow, charged with support and education of grand-children.*—Where a testator, by the second clause of his will, devised and bequeathed to his wife all the property of which he might die possessed, “during the term of her natural life, to be by her kept together” on his plantation “for the purpose of supporting her, and for the support and education of my [his] five grand-children”; and, by the fourth clause, devised a tract of land to one of his daughters, “which,” he declared, “is excepted out of the life-estate heretofore given to my wife,”—*held*,

that the widow took the entire life-estate, charged with the support and education of the grand-children, and not in trust for their benefit equally with herself.

2. *When administrator cannot come into equity.*—The administrator of a deceased tenant for life cannot come into equity, to recover property which he claims as emblements accruing during the year in which his intestate died; his remedy at law being adequate and complete.

APPEAL from the Chancery Court of Choctaw.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Willie J. Coleman, as the administrator of Mrs. Rebecca Kemp, deceased, (who was the widow and administratrix of her deceased husband, Joseph Kemp,) against James Camp, both individually and as surviving administrator with the will annexed of said Joseph Kemp, W. A. J. Cahoon and wife, and the children of Washington Kemp, deceased; Mrs. Cahoon and Washington Kemp being children of said Joseph Kemp. Its object was to recover certain personal property, which the complainant claimed as belonging to the estate of his intestate under the will of said Joseph Kemp; being chiefly Mrs. Kemp's accumulations during her life from the property in which she had a life-estate under her said husband's will, and the crops growing on the plantation at the time of her death in August, 1856. Joseph Kemp died in the latter part of the year 1852, having made and published his last will and testament, which was duly admitted to probate after his death, and which contains the following clauses:

“*First.* I wish all my just debts and funeral expenses paid, out of any funds in the hands of my executrix, as soon after my decease as possible. *Secondly,* I give and devise unto my wife, Rebecca Kemp, all the property, both real and personal, of which I may die possessed, (except as hereinafter excepted,) during the term of her natural life; to be by her kept together, on my plantation on which I now reside, for the purpose of supporting my said wife, and for the support and education of my five grand-children, the children of my son, Washing-

ton Kemp, deceased; and after her death, then said property and estate to be disposed of as follows: *Thirdly*, I give and devise unto my grand-children, sons of my son, Washington Kemp, deceased, (to-wit, Edward T. Kemp, James W. Kemp, John M. Kemp, and Robert W. Kemp,) to take effect after the termination of the aforesaid life-estate, all that parcel of land lying on the Tombigbee river, known as the 'Kemp Landing tract', it being the plantation on which I now reside; also, all my lands adjoining said plantation; to them, and to the survivor of them—that is, [if] any of said children should die before majority, then the share of such deceased child or children shall vest in the survivor or survivors of them, provided such deceased shall have no children of his own; then to such children, if any there be, and to their heirs forever. *Fourth*, I give and devise unto my daughter, Mary Ann Rebecca Cahoon, wife of William Cahoon, all that tract of land known as the 'Philibar tract', containing one hundred and twenty acres, together with the appurtenances; which is excepted out of the life-estate heretofore given to my wife, and is to vest in the said Mary Ann Rebecca at my death, for her sole and separate use and benefit during her life, and after her death to the children of her body lawfully begotten; but, if she die without children, then said tract of land, with the appurtenances, to go to the children of Washington Kemp, deceased, share and share alike, to the exclusion of her said husband. *Fifth*, I give to my daughter, Mary Ann Rebecca Cahoon, wife of William Cahoon, one hundred and fifty dollars *per annum*, to be paid to her annually by my executrix, for her separate use and support, for the term of twenty years, or until such time as the general distribution of my estate shall take place, and no longer. *Sixth*, If my Rebecca shall die before the youngest of my grand-children becomes of age, then I wish my property kept together on the plantation on which I now reside, until the said youngest child becomes of age; then, after all the legacies are paid and confirmed, the residue of my property, both real and personal, I wish distributed equally among my five grand-children, children of said Washing-

ton Kemp, and my daughter, Mary Ann Rebecca Cahoon, wife of William Cahoon; giving to my said daughter one-sixth part of said residue, for and during her natural life, and after her death to the children of her body; and if she dies without children, then to my said grand-children, children of Washington Kemp, deceased. *Lastly*, I hereby constitute my wife, Rebecca Kemp, executrix of this my last will and testament, hereby revoking all former wills by me heretofore made. In testimony whereof," &c.

The chancellor held, that Mrs. Kemp took a life-estate in the property, subject to a charge for the support and education of the grand-children; and that the complainant had an adequate and complete remedy at law. He therefore dismissed the bill for want of equity, but without prejudice to the institution of an action at law; and his decree is here assigned as error.

T. REAVIS, for appellant.

LOMAX & PRINCE, *contra*.

STONE, J.—If the rights of Mrs. Kemp rested alone on the second clause of the will, we would be strongly inclined to hold, that she took the life-estate in trust for the equal benefit of herself and the children of Washington Kemp, deceased. The same words are employed in that clause to confer on each their respective interests. The fourth clause, however, sheds light on this question, and leaves us no room to doubt, that Mrs. Kemp was the chief object of testator's bounty; and that his object was simply to incumber her life-estate with the support and education of his grand-children. That clause, after making a devise to testator's daughter, Mrs. Cahoon, of a tract of land, employs this emphatic language—"which" [the land devised] "*is excepted out of the life-estate heretofore given to my wife.*" This is the testator's exposition of the language found in the second clause, and confers on Mrs. Kemp a life-estate in the property devised and bequeathed. *McCroan v. Pope*, 17 Ala. 612.

[2.] Under this view, complainant had a complete and adequate remedy at law, and his bill was without equity.

Decree of the chancellor affirmed.

CAMP vs. COLEMAN.

[TROVER FOR CONVERSION OF PERSONAL PROPERTY.]

1. *Bequest to widow and executrix construed as enuring to her individually, and not officially.*—Under a devise and bequest in the following words: “I give and devise to my wife Rebecca all the property, both real and personal, of which I may die possessed, (except as hereinafter excepted,) during the term of her natural life, to be by her kept together, on my plantation on which I now reside, for the purpose of supporting my said wife, and for the support and education of my five grand-children, the children of my deceased son Washington; and after her death, then said property and estate to be disposed of as follows,”—whatever interest vests in the widow, she takes individually, and not as executrix; and if a trust is thereby imposed upon her, it does not attach to the office of executrix, nor pass on her death to her co-administrator.
2. *Assent to legacy.*—Where a life-estate in the bulk of the testator’s property, consisting of lands, slaves, &c., is given to his widow, who is also appointed executrix; and who afterwards procures the probate of the will, and qualifies as administratrix with the will annexed,—her continuous use of the property during her life, in accordance with the provisions of the will, is an implied assent to her own legacy, which involves an assent to the legacy to the remainder-men.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by James Camp, as the administrator with the will annexed of Joseph Kemp, deceased, against Willie J. Coleman, to recover damages for the conversion of fifty-nine bales of cotton and twenty-five cords of wood. The case was tried on an agreed state of facts, which is thus stated in the bill of exceptions:

“Joseph Kemp, the plaintiff’s testator, died in 1852, and his will was afterwards duly admitted to probate; a copy of which will is made a part of this agreement.” [This will is set out at length in the report of the chancery case between these same parties, (p. 160) and needs not to be repeated here.] “Rebecca Kemp, the widow of

said testator, did not dissent from the will, nor did she qualify as sole executrix; but, at her instance, and with her consent, letters of administration with the will annexed were issued, by the probate court of Choctaw county, to herself and the plaintiff in this action; and they were duly qualified as administrators, and acted as such jointly up to the death of said Rebecca; after which time, plaintiff continued to act as sole administrator, and is still acting in that capacity. After the death of said testator, the said Rebecca continued to reside on the plantation mentioned in the will, and took possession of the personal property therein bequeathed, and used and managed the same, and kept up the plantation, with a wood-yard there-to attached, according to the provisions and directions of the will. The said wood-yard constituted a part of the tract of land on which said testator resided at the time of his death, and was kept up by him for selling and supplying wood to steamboats on the river; and said wood-yard was kept up after his death as it had been before. During the aforesaid joint administration, said administrators paid off all the debts of the testator, and the charges upon the administration, under the will and otherwise; and said Rebecca also supported and educated the testator's grand-children, as directed in the will, out of the proceeds of said property. In the course of her administration and management of the estate as aforesaid, the said Rebecca employed the negroes and other forces on said plantation, during certain seasons, as the testator had done, in getting wood for said wood-yard, which was collected and deposited therein; and a part of said wood, so collected and deposited by her, remained there, and was unsold at her death. In the year 1856, said Rebecca planted and cultivated a crop of cotton, partly on said plantation, and partly on an adjoining tract of land, which she had previously purchased, for herself, from the defendant. Said crop was planted and cultivated by her with the slaves and other planting force of the estate, and was not matured at her death. Said Rebecca died in July, 1856, intestate, and still indebted for the said land purchased from the defendant. Soon after her death, the

defendant, having duly qualified as her administrator, entered upon the testator's said plantation and the land purchased from himself, claiming as such administrator, and took possession of the slaves and other personal property thereon, and continued the cultivation of the crops thereon growing, and gathered said crops when matured, and housed them on the plantation which was of the testator's estate; and all this he effected solely with the slaves and other forces of the testator's estate, of which the said Rebecca died possessed. The said Rebecca in her life-time, and the said defendant after her death, in cultivating said crops, and gathering the same, and also in collecting wood for said wood-yard, did not use or employ therein any other labor or planting force than that which belonged to the estate of said Joseph Kemp, and which was in the hands of said Rebecca at the time of her death. The said crop of cotton was also ginned by said defendant, with the same force, on a cotton-gin on the plantation of said Joseph Kemp, which had been purchased by said Rebecca in her life-time, for the use of said plantation, and was paid for by her out of the proceeds of said testator's estate in her hands. The cotton sued for in this action is the same cotton so gathered and ginned by the defendant; about two-thirds of said cotton being made on the plantation of said testator, and the residue on the land purchased by said Rebecca. On the 11th January, 1857, said defendant also took and converted to his own use the said cotton, amounting to fifty-nine bales, and of the net value of \$3,367 23; and took and converted — cords of wood lying at said wood-yard, and which had been deposited there by the said Rebecca as aforesaid, valued at \$43 75. The property so taken and converted by the defendant, he claims to have and hold as administrator of the estate of said Rebecca, and has refused to deliver up or account to plaintiff for the same, or any part thereof."

"This being all the evidence, the court charged the jury, that, conceding it all to be true, the plaintiff could not recover in this action"; to which charge the plaintiff excepted, and which he now assigns as error.

LOMAX & PRINCE, for the appellant.—The will does not give Mrs. Kemp any estate or interest separate or different from that which the grand-children take. She was to receive the income in trust for them and herself, for their and her own support. The interest which she takes is described and limited in the same terms, and by the same words, as that which the grand-children take. Their support and education is no more a charge on her estate, than her support is a charge on theirs. She has no more right than they have to appropriate the entire income, or more than sufficient to satisfy the declared object—that is, a support according to their relative wants and necessities. For analogous cases, see *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. 999; *Jasper & Maclin v. Howard*, 12 *ib.* 652; *Spear v. Walkley*, 10 *ib.* 328; *Nimmo v. Stewart*, 21 *ib.* 682. The accumulations arising from the property, after providing for the support of the widow and the support and education of the grand-children, belong to the general fund for distribution. The widow takes as executrix and trustee; and, as an express provision is made for her, the implication arises that the surplus falls into the *corpus* of the estate.—1 *Jarman on Wills*, 461, 462, 465.

T. REAVIS, *contra*.—The second clause of the will, construed in connection with the third and fourth, gives the widow a life-estate in the property, charged with the payment of debts and funeral expenses, the support and education of the grand-children, and the payment of an annuity to Mrs. Cahoon. The words on which the appellant relies, do not limit, reduce, or divide the estate given to the widow, but merely show the motive for the bequest. See *McCroan v. Pope*, 17 Ala. 612; *Wallace v. Dold*, 3 Leigh, 258; *Barnes v. Simms*, 5 Ired. Eq. 399; *Moore v. Gamble*, 1 Stockton, (N. J.) 246; *Crawford v. Patterson*, 11 Grattan, 364; *Bradshaw v. Ellis*, 2 Dev. & Bat. Eq. 22.

A. J. WALKER, C. J.—The second clause in the will of Joseph Kemp contains a bequest to Mrs. Rebecca Kemp, and vests her with a life-estate in the property

therein referred to. Whether she took the title subject to a trust in favor of the testator's grand-children, is a question which does not arise in this case, but which is considered in the chancery case between the same parties at the present term. Whatever interest was vested in Mrs. Kemp by that clause of the will, she took as an individual, and not as executrix. If a trust was thereby created and imposed on her, it was one which did not belong to the office of executrix, and did not pass to her co-administrator on her death.—Hitchcock v. United States Bank, 7 Ala. 434; Lucas v. Price, 4 *ib.* 682; Perkins v. Moore, 16 *ib.* 14; Hill on Trustees, 237, note 1; 1 Lomax on Ex'rs, 368; Conklin v. Egerton, 21 Wendell, 448; Wells v. Cowper, 1 Ohio, (Ham.) 313; Judson v. Gibbons, 5 Wendell, 228.

[2.] Mrs. Kemp's continued use of the property conveyed by the second clause of the will, in pursuance to the provisions and directions of the will, authorizes the implication of an assent to her legacy.—Walker v. Walker, 26 Ala. 262; George v. Goldsby, 23 *ib.* 326; Gantt v. Phillips, 23 *ib.* 275; 2 Williams on Ex'rs, 1180. The assent to the vesting of the estate for life, was an assent to the legacy in remainder; and consequently, upon the death of Mrs. Kemp, the property went to the remainder-men, and did not return to the personal representative of the testator.—See the authorities collected in Shepherd's Digest, 187, § 5. The plaintiff had no title to the property in controversy, and the ruling of the court below was correct.

Judgment affirmed.

CAIN vs. GIMON.

[BILL IN EQUITY TO SET ASIDE SALE UNDER MORTGAGE.]

1. *Effect of amendment of bill.*—So far as the equity of the bill is concerned, an amendment takes effect as of the date of the original bill.
2. *What amendments are allowable.*—A mere inconsistency, or repugnancy, between the allegations of the original and amended bills, does not render the allowance of the amendment improper: there must be an inconsistency, or repugnancy, in the purposes of the bill, as contradistinguished from a modification of the relief sought.
3. *Purchase by mortgagee at mortgage sale; who may impeach it, and on what ground.*—The wife of the mortgagor, claiming under a voluntary conveyance from her husband subsequent to the mortgage, may, in equity, impeach the validity of the sale under the mortgage; and if her bill alleges that the mortgage debt was nearly (if not quite) paid, that the mortgagee concealed from her the true state of the account between himself and the mortgagor, had the property sold for a pretended debt greater than was actually due, and, in effect, became himself the purchaser at the sale, she makes out a case for equitable relief.
4. *Offer to do equity.*—In a bill filed by a voluntary purchaser from the mortgagor, seeking to set aside the sale under the mortgage on the ground of fraud, and to be let in to redeem, an averment that the complainant is ready to pay the amount admitted to be due on the mortgage debt, "and hereby tenders that amount, or any other sum that may be found due, and submits herself to this court for its decree in that behalf", is a sufficient tender.
5. *Estoppel against tenant from denying landlord's title.*—The acceptance of a lease from a stranger, by a party who is in possession of land, if done "in ignorance of his rights," does not estop him from afterwards impeaching the validity of such stranger's title.
6. *Who may take advantage of usury.*—The wife of the mortgagor, claiming under a subsequent voluntary conveyance from her husband, and seeking to impeach the validity of the sale under the mortgage, and to be let in to redeem, cannot take advantage of usury in the mortgage debt.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed, on the 5th November, 1857, by Mrs. Mary Jane Cain, suing by her next friend, against Dominique Gimon, J. R. Lassabe, and Alphonse Hurtel. Its object was, to set aside as fraudulent a sale made under a mortgage, or deed of trust, made by Lassabe as trustee; to have the accounts between the mortgagor and mortgagee re-stated, and a redemption allowed to the complainant, who was the wife of the mortgagor. The mortgage was executed on the 11th September, 1851, by William Cain, then the husband of the complainant, and conveyed a certain lot in Mobile to said Lassabe as trustee, to secure the payment of a promissory note for \$325, given by said Cain on that day to said Gimon, and payable twelve months after date; "said Cain to be permitted to remain in the possession of said lot until default, and the lot to be sold, in case of default, at said Gimon's request, at public auction, to the highest bidder for cash, after advertisement for at least ten days; the proceeds of said sale to be applied to the payment of the expenses thereof, then to the payment of the note, and the remainder (if any) to said Cain." The sale under this mortgage was made on the 13th October, 1856; and the trustee executed a deed to John Conche, as the highest bidder, upon the consideration of \$300. On the 15th November, 1856, Conche sold and conveyed his interest, by quit-claim deed, upon the consideration of \$500, to Gideon M. Parker, who, on the 27th May, 1857, by a similar deed, and upon like consideration, sold and conveyed to Gimon. The bill charged that Conche, in becoming the purchaser at the trustee's sale, "was in fact only the creature of Gimon; that the purchase by said Conche, and by said Parker from him, and by Gimon from Parker, were all merely colorable; that no money in fact really passed; but that the transactions were so done for, and at the request of said Gimon."

The complainant asserted an interest and title in the mortgaged premises under a voluntary conveyance from said William Cain, her husband, dated the 27th October, 1853; by which the premises were conveyed, in consideration of natural love and affection, to William J. Provost

as trustee, "for the sole use, profit and benefit of the said Mary Jane Cain and the heirs of her body." This deed was duly recorded, and the trust was accepted by Provost; but, on the 25th January, 1856, on the application of the complainant, the chancery court removed said Provost, and appointed Alphonse Hurtel as trustee in his stead. The bill sought to have the sale under the mortgage set aside, and the accounts between Cain and Gimon re-stated, on the ground of fraud in the sale, and of usury in the mortgage debt. The usury is thus charged in the original bill: "Complainant is informed and believes, and therefore charges, that the origin of said deed of trust from Cain to Lassabe as trustee was as follows: Cain borrowed from Gimon the sum of \$250, for twelve months; Gimon loaned said sum to him in consideration of the usurious interest of two-and-a-half per cent. per month; and said Cain gave Gimon his promissory note for \$325, (which included the principal sum loaned and one year's interest thereon,) and made said deed of trust to secure the payment of said note. Complainant is informed and believes, and therefore charges, that said Cain paid to said Gimon, and to said Lassabe for him, at three several times, as interest on said note, the sum of \$225 in all; but she does not know the precise times of said payments, and seeks a disclosure of the same from said Gimon and Lassabe."

The 15th paragraph of the original bill was as follows: "Complainant charges, that said sale was made, as she is informed and believes, in fraud of her rights, and with the intention on the part of said Gimon to injure her; that said Gimon knew her poverty and helplessness, and that she was the beneficiary under the deed to Provost, and that her husband had abandoned her; yet said Gimon concealed the true state of accounts between him and said Cain, pretended that much more was due than was the fact, and finally directed his said trustee (Lassabe) to advertise and sell under his trust. The sale was for cash, and environed with such suspicious circumstances that no stranger would bid; and said Gimon was thus enabled to have it knocked down to said Conche, who was in fact

his creature in the transaction." An amendment of the bill was afterwards allowed, by which this paragraph was stricken out, and the following inserted in lieu of it: "Complainant, though she is not informed of the actual state of the accounts between said Cain and Gimon, and of the manner in which they were made up at the time of the sale by said Lassabe, is informed and believes, and therefore charges, that the debt for which said deed of trust to Lassabe was made, amounted to only \$250; that divers payments were made on the same by said Cain; that said Gimon overcharged his account, by compounding the interest, and by assuming the original debt to have been \$325, instead of \$250, the amount actually borrowed from him by Cain; that said accounts were made up by said Gimon and Lassabe, in the absence of, and without submitting them to said Cain, or to complainant, or to her said trustee, although said Lassabe, as well as said Gimon, had notice of said deed to Provost as trustee; that said Gimon did not credit said account with the amount which he received from Crevallaire,—the property conveyed to whom by said Gimon, this complainant charges, was worth at least \$400 at the time of the conveyance; that the result of said accounting, whatever it was, was unjust to, and a fraud upon this complainant; that said fraud was deliberately perpetrated by said Gimon, and carelessly acquiesced in by said Lassabe without examination and investigation; and that the sale of said property by Lassabe, under said deed, was consequently made on false and fraudulent grounds."

The 16th paragraph of the original bill was as follows: "Complainant is informed and believes, and therefore charges, that the actual amount due to said Gimon, at the time of said sale, was less than \$50; but, being ignorant of the sum that may be really due, and said Gimon fraudulently claiming the property as his own, complainant is not in a situation to make a tender to him, which she would willingly do." This paragraph was also stricken out by amendment, and the following inserted in its stead: "Complainant further saith, that she is informed and believes, and therefore charges, that without the credit

on said Cain's account of any sum whatever for the sale to Crevallaire by Gimon, said Cain's debt to Gimon was not actually more than \$50, if so much, at the time of the sale by Gimon; and complainant hereby tenders that amount to said Gimon, and is ready to pay that amount, or any other sum that may be found due by Cain to him, and submits herself to this court for its decree in that behalf."

In reference to the sale to Crevallaire, alluded to in the amendments above copied, the original bill alleged, that William Cain, on the 1st December, 1854, sold and conveyed to Margaret Crevallaire, in consideration of \$200, a portion of the mortgaged premises; that this portion of the premises was included in the deed to Provost as trustee, but was not sold under the mortgage; and that the complainant did not join with her husband in the conveyance. The amended bill added, "that Gimon, in January, 1855, made a deed of said land to said Margaret Crevallaire, for a valuable consideration paid by her to him, (how much, complainant is not informed;) and that said Gimon, at the time he made said deed, had notice of the existence of said deed to Provost, as trustee, for the benefit of the complainant."

The original bill alleged, that the complainant had been in possession of the premises sold by Lassabe, since the removal of Provost as her trustee, in January, 1856; that neither Conche nor Parker ever demanded rent of her; "that said Gimon, after Parker conveyed to him, called on her to take a lease, which she did in ignorance of her rights"; that this lease expired on the 1st November, 1857; and that Gimon afterwards notified her to quit the premises, and sued her for \$20 arrears of rent.

The prayer of the original bill was, that Gimon might be enjoined and restrained from the further prosecution of his action at law; that the loan of money by Gimon to Cain might be decreed usurious; "that the sale by Lassabe, and the deed to Conche, be annulled and vacated; that the other deeds, completing the circuit of fraud whereby the property got to Gimon, be declared void; *that it be referred to the master to state the accounts be-*

teen said Cain and Gimon, and that the court make such order and decree in the premises as equity and good conscience demand." The amended bill struck out the words which are italicized, and, in lieu of them, inserted the following: "Complainant prays, that said Gimon and his said trustee be held to account to her, as the beneficiary under said deed to Provost, for so much money as may be due to said Cain upon a full and complete settlement of the accounts between him and said Gimon; that it be referred to the master to state the accounts under the direction of the court, and that the court would grant such other and further relief in the premises as in equity and good conscience she may be entitled to."

The chancellor sustained a demurrer to the bill, as amended, for want of equity; and his decree is now assigned as error.

WM. C. EASTON, for appellant.

L. S. LUDE, *contra*.

STONE, J.—In *Blackwell v. Blackwell*, 33 Ala. 57, we said, "All amendments, which are properly allowed, take effect, so far as the equity of the bill is concerned, as of the date of the original bill." So, if the amendment was properly allowed, and the bill as amended contains equity, it should not have been dismissed for any defect in the original bill.

[2.] It is contended, however, that the amendment makes a new case, and should not have been allowed. In *Ingraham v. Foster*, 31 Ala. 123, we considered this question, and held that, "to make an amendment improper, it is not enough that there be a mere inconsistency or repugnancy of allegation. There must be an inconsistency or repugnancy in the purposes of the bill, as contradistinguished from the modification of the relief. One of the purposes of a chancery amendment is to correct an erroneous statement of the facts." To the same effect is *Blackwell v. Blackwell*, *supra*. The amendment in this case was allowable, and it does not make a new case.

[3.] It is further urged against the relief sought in this

case, that Mrs. Cain, not being a party to the trust deed from Cain to Lassabe for the benefit of Gimon, can not object to any irregularity in the sale. *Brown v. Lipscomb*, (9 Porter, 472,) *Foster v. Goree*, (5 Ala. 424,) *Gary v. Colgin*, (11 *ib.* 514,) and *Herbert v. Harrick*, (16 *ib.* 581,) are cited in support of this position. In each of these cases, the question arose in actions at law; and in each case, the attempt was made, in a collateral proceeding, to pronounce the title defective. There is a marked distinction between the cases cited and the one we are considering. The deed executed by Mr. Cain to Provost, in trust for the sole use and benefit of Mrs. Cain, though voluntary, had the effect of conveying away all the interest which Mrs. Cain had in the lot. This interest, as against Gimon, and Lassabe his trustee, was an equity of redemption. Then, Mrs. Cain, the complainant, succeeded in equity to all the rights which had remained in her husband. One of those clear rights was, to pay off the mortgage debt, and redeem the land. The bill alleges, that the mortgage debt was nearly or quite paid; and that Gimon, by concealing the true state of the account, and falsely stating it, perpetrated a fraud on complainant, and procured the land to be sold under a pretended debt, much larger than the real liability. The bill further charges, in effect, that Gimon was the real purchaser at the trust sale. The fraud charged in the bill, if admitted or proved, is sufficient to set aside the sale—made, as it is charged, to the beneficiary—and to let in Mrs. Cain to redeem.

[4.] The amended bill contains a sufficient tender in cases like this.—*Nelson v. Dunn*, 15 Ala. 501; *Billingslea v. Ware*, 32 *ib.* 415.

[5.] The bill, as it is amended, offers a sufficient excuse for the delay in filing the bill, and for accepting a lease under Mr. Gimon.—*Shelton v. Carroll*, 16 Ala. 148, 153.

[6.] Under our decisions, Mrs. Cain can not make the defense of usury, that being a personal defense.—See *Cook v. Dyer*, 3 Ala. 643; *Sayre v. Fenno*, *ib.* 458; *Harbinson v. Harrell*, 19 *ib.* 753; *Gray v. Brown*, 22 *ib.* 262.

In the preparation of this opinion, we have considered

only the averments of the bill and amendments. The proof may fall far short of sustaining them.

Decree of the chancellor reversed, and cause remanded.

EASTERWOOD vs. LINTON.

[BILL IN EQUITY BY PURCHASER, FOR REFORMATION OF TITLE-BOND, ABATEMENT OF PURCHASE-MONEY, AND INJUNCTION OF ACTION AT LAW.]

1. *Weight of responsive answer.*—A sworn answer, denying a material allegation of the bill, throws on the complainant the *onus* of sustaining his averment by the testimony of two witnesses, or of one witness with corroborating circumstances.
2. *Reformation of title-bond; variance between allegations and proof.*—Under a purchaser's bill, seeking a reformation of his vendor's title-bond, by the insertion therein of a parcel of land, which, he alleges, was a part of the tract purchased by him, and was omitted from the bond by the fraud or mistake of his vendor,—if the evidence shows that said parcel was omitted by mistake, and that another parcel, not constituting a part of the tract sold, was inserted in the bond by mistake in lieu of the omitted parcel, the complainant cannot have a decree.
3. *Same.*—So, where the bill alleges, that the vendor had no title to one parcel of land included in the title-bond; and the evidence shows that said parcel formed no part of the tract sold, but was inserted by mistake in lieu of another parcel, to which the vendor had title,—the complainant cannot have a decree.

APPEAL from the Chancery Court of Pickens.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by David Easterwood, against Samuel D. Linton and William A. Linton, for the purpose of reforming a title-bond for lands purchased by the complainant from the defendants, obtaining an abatement of the purchase-money, and enjoining an action at law on the notes given for the purchase-money. The defendants answered, and also filed a cross bill. On final

hearing, on pleadings and proof, the chancellor held, that the complainant was entitled to no relief under his bill; but he decreed a reformation of the title-bond under the cross bill, at the costs of the complainant; and this decree is now assigned as error.

T. REAVIS, for appellant.

A. B. CLITHERALL, *contra*.

A. J. WALKER, C. J.—The bill alleges, that the west half of the south-west quarter of section twenty-two, the south-east quarter of the north-east quarter of section twenty-eight, and the north-east quarter of the north-east quarter of section twenty-eight, (in township nineteen, range fifteen,) were bought by the complainant, and, through fraud or mistake on the part of the defendants, omitted from the bond for titles which they gave him. The answers deny that two of those pieces—the west half of the south-west quarter of section twenty-two, and the north-east quarter of the north-east quarter of section twenty-eight—were sold to the complainant, or pointed out to him as a part of the land sold. There being no waiver of a sworn answer, it was incumbent upon the complainant to overcome this denial by the testimony of two witnesses, or of one witness with corroborating circumstances. After a careful scrutiny of the testimony, we agree with the chancellor, that it does not, under that rule, successfully controvert the denial of the defendants.

[2.] The answers admit that the other piece of land—the south-east quarter of the north-east quarter of section twenty-eight—was pointed out as a part of the land sold, and was omitted from the bond by mistake. The defendants deny fraud; assert their readiness, willingness and ability to make title to the omitted parcel of land; allege that, by mistake, another parcel was inserted in the bond in lieu of the omitted parcel; and claim that the land improperly inserted should be stricken out, and that the land omitted by mistake should be inserted. The allegations of the answer, in reference to this matter, are sustained by the evidence. The complainant is not enti-

tled, under his bill, to a reformation of the bond by the insertion of the parcel of land omitted by mistake; for that omission is only a part of the mistake, which consists also of an erroneous insertion. The court cannot correct the entire mistake, by striking out the land inserted by mistake, as well as inserting that omitted by mistake, without granting relief in the absence of appropriate allegations. It would be palpably unjust to the defendants to reform the bond by supplying the omission, without also striking out that which was inserted by mistake.

[3.] The complainant alleges, also, that the defendants had no title to the north-east quarter of the south-west quarter of section twenty-one, the west half of the north-east quarter of section twenty-seven, and the north-west quarter of the south-east quarter of section twenty-seven, which are mentioned in the title-bond. The defendants admit that they had no title to one of these parcels—the north-east quarter of the south-west quarter of section twenty-one—but aver that it was inserted in the bond by mistake, in lieu of the north-west quarter of the south-west quarter of the same section; and that the parcel included in the bond is almost worthless, while that to which they had title, and which they actually sold, is very valuable; and that they are ready and willing to make title to it. These averments of the answer are fully sustained by the proof; and being sustained, the only relief that could be claimed in reference to the mistake committed, would be a reformation of the bond, by inserting the omitted, in lieu of the included parcel,—to which relief the complainant is not entitled under his bill.

As to the two other parcels of land—the west half of the north-east quarter of section twenty-seven, and the north-west quarter of the south-east quarter of section twenty-seven—which the complainant alleges were included in the bond, and to which he says the defendants had no title, it is sufficient to say, that they are not embraced in the bond, and were not sold to the complainant. They are not mentioned in the bond, and evidently had nothing to do with the sale.

Another ground for relief alleged in the complainant's bill is, that a certain water-mill upon the premises sold was a material inducement to the purchase; that the defendants, prior to the sale, had given to one Jemison, who had a mill below on the creek, permission to back up the water, so as to impair the value of the mill on the lands sold to the complainant; and that the fact of such permission having been given was fraudulently concealed from the complainant. The defendants deny that they gave such permission, and there is no proof opposed to their denial.

The defendants deny all charges of fraud, and the proof fails to sustain the imputations of the complainant's bill in that particular.

From what we have said it results, that the chancellor did not err in holding that the complainant was not entitled to any relief under the original bill.

The only objection made in the argument of the appellant's counsel to the decree of the chancellor under the cross bill, is that the cross bill was repugnant, in one particular, to the answers to the original bill. This objection is not well taken in point of fact. The repugnancy mentioned in the argument does not exist. We perceive no error in the proceedings of the court below under the cross bill; and as it is not contended that error supervened in those proceedings in any other matter than that already noticed, we do not deem it proper or necessary to say more in reference to the decree under the cross bill.

Decree affirmed.

GARROTT & BROOKS vs. FULLER.

[DETINUE FOR SLAVES.]

1. *Liability of sureties on detinue bond; judgment reversed in part, and rendered.*—There is no statute in this State, authorizing a summary judgment for costs against the sureties on a detinue bond, jointly with their principal, on his dismissal of the suit; and if such judgment is rendered, it will be reversed on error as to the sureties, and affirmed as to their principal.

APPEAL from the Circuit Court of Perry.

The record does not show the name of the presiding judge.

THIS was an action of detinue, instituted by Thomas H. Nelms, as the administrator of Alfred Fuller, deceased, against Elijah W. Fuller and others. The plaintiff made the affidavit, and gave the statutory bond, with I. W. Garrott and Wm. M. Brooks as his sureties, to obtain the possession of the property. At the return term of the summons, the plaintiff dismissed his suit; and the court thereupon rendered judgment for the costs against him and his sureties. From this judgment the sureties now appeal, and here assign the same as error.

GARROTT & BROOKS, *pro se*.

J. R. JOHN, *contra*.

A. J. WALKER, C. J.—There is no statute in this State, authorizing the summary judgment for costs which was rendered against the sureties on the detinue bond. The judgment must, therefore, be reversed as to the sureties, but must stand so far as the plaintiff in the action is concerned; and the cause will not be remanded.

WALKER vs. GREGORY.

[DETINUE FOR SLAVES AND OTHER PERSONAL PROPERTY.]

1. *Illegal consideration*.—A contract, whether in form a settlement on a mistress, or a promise to pay money, made upon consideration of future illicit cohabitation between the parties, is void; and although the law may presume, where the evidence leaves it doubtful whether the consideration was past or future cohabitation, that the former was the real consideration; yet, where it is shown that “there was evidence conducing to prove that the real consideration was future illicit intercourse,” the court may properly refuse a charge asserting that legal proposition, although “there was also evidence tending to prove that there had been prior illicit intercourse between them.”
2. *Same*.—Where a party plaintiff cannot make out his case, without the aid of a contract founded on an illegal consideration, he is not entitled to recover, although the contract may have been executed on his part; but, where a party is resisting a recovery, the rule may possibly be different.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by Mary Walker, against Terrell Gregory, to recover certain slaves, together with “twenty head of hogs, one horse, saddle and bridle.” The only plea was the general issue, “with leave to give in evidence any special matter which might be pleaded in bar.” The facts of the case are thus stated in the bill of exceptions:

“The plaintiff proved the value of the slaves sued for, and their hire, and that they were in the defendant’s possession at the commencement of the suit; also, that the slave Rachel, the mother of the other slaves sued for, was the property of Jeremiah Gregory on the 24th April, 1849, and so continued to be up to the time of his death in 1853; while the defendant introduced evidence tending to show, that said slave was his property on said 24th April, 1849, and so continued to be. After proving its

execution, plaintiff offered in evidence a written agreement between herself and said Jeremiah Gregory, a copy of which is hereunto annexed as a part of this bill of exceptions; and introduced evidence tending to show, that she had been living in the house of said Gregory a short time when said agreement was executed; and that she continued to reside there and perform her part of said written agreement. There was, also, evidence conducing to prove, that the real consideration of and for said agreement was future illicit intercourse between said Gregory and plaintiff. The plaintiff introduced evidence, also, tending to prove that there had been illicit intercourse between them before the execution of said agreement, and that the said Gregory was the father of her two youngest illegitimate children. It was proved, also, that plaintiff had never been married, that she had three illegitimate children, and that her general character for chastity was bad; also, that said Gregory was a married man at the time of the execution of said agreement, and had been for many years previous; that his wife lived with him up to the time of his death, and that they had one child, who is the administrator of said Gregory's estate and the defendant in this suit."

The agreement above referred to is signed by both the parties, and is in the following words: "Agreement made and entered into the 24th day of April, A. D. 1849, between Jeremiah Gregory and Mary Walker, both of the county of St. Clair and State of Alabama, witnesseth, that said Gregory agrees with said Mary Walker to give her at his death one negro, together with the future increase from this date, and twenty head of hogs, one horse, saddle and bridle, for and in consideration of her services during his life, in attending to the business of his house, and working in the house, and attending to and keeping in repair the clothing of the family, furniture, and beds; also, to find board for her and her two children during the same period; and on her failing to comply with said stipulations, this agreement to be null and void. And the said Mary Walker hereby agrees to attend to the household business of said Gregory during his life, (should

she live so long,) and to use due care, industry and diligence in keeping the household furniture and apparel in order and repair, and to accept for her services, at the death of said Gregory, said female slave Rachel, with her increase, and board and sustenance for herself and her two children, and twenty head of hogs, one horse, saddle and bridle. In testimony whereof," &c.

"Upon this state of facts, the court charged the jury, among other things, (1st,) that if they were satisfied from the evidence that the real and only consideration for the making of said agreement on the part of said Gregory and plaintiff was future illicit intercourse, then the agreement was illegal, and plaintiff could not recover on it; but (2d,) if they were satisfied from the evidence that said agreement was made in consideration of past illicit intercourse, then it was good and valid, and plaintiff would be entitled to recover. The plaintiff excepted to the first charge, and then asked the court to charge the jury as follows: 1. 'That if the proof shows cohabitation both before and after the contract, and either one or the other was the consideration of the contract, then the presumption of law is, that it was for past cohabitation; and that past cohabitation is a good consideration, and sufficient to sustain the contract.' 2. 'That if the contract is proved, and performed by the plaintiff, then it is executed, and vests the title to the slaves in her on the death of said Gregory, (if the title was in said Gregory at the time said contract was made,) and she is entitled to recover; and, although the contract may have been illegal, this cannot be set up as any defense in this action.' The court refused to give either of these charges, and the plaintiff excepted."

The rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

ALEX. & JNO. WHITE, for appellant.—1. The first charge asked should have been given. Parties will be presumed to have contracted legally, where the contract is susceptible of a legal and an illegal construction.—*Lewis v. Davidson*, 4 Mees. & W. 653; *Broom's Legal Maxims*, 471;

Atherly on Marriage Settlements, 391-2; Gray v. Mathias, 5 Vesey, 286.

2. The plaintiff having performed her part of the agreement, the contract operated as an actual conveyance of the title to the property.—Sewall v. Henry, 9 Ala. 24; Eiland v. Radford, 7 Ala. 726; McLeod v. Powe, 12 *ib.* 9. When an immoral contract has been executed, the parties being *in pari delicto*, the court will not set it aside.—1 Story on Contracts, § 543; Worcester v. Eaton, 11 Mass. 378; 1 East, 94; 8 Durn. & E. 575; 1 Story's Equity, § 297; Adams v. Broughton, 13 Ala. 741; Marler v. Marler, 6 *ib.* 367; Eddins v. Wilson, 1 *ib.* 237.

JAS. B. MARTIN, *contra*.—1. That the court did not err in the charges given, or in the refusal of the charges asked, is fully shown by the following authorities: Stanley v. Nelson, 28 Ala. 514; 6 Ohio, 19; 11 Mass. 368; 5 Cowen, 253; Harper's (S. C.) R. 201; 1 Parsons on Contracts, 380-81; 1 Greenl. Ev. § 284; Gunter v. Leckey, 30 Ala. 591.

2. The first charge asked was properly refused, because it was calculated to confuse and mislead the jury.

R. W. WALKER, J.—There can be no doubt, that a contract which is made upon consideration of future illicit intercourse between the parties, is illegal and void. The rule includes a settlement on a mistress, equally with a promise of payment for future illicit intercourse.—Ath. on Mar. Set. 390; 27 Law Lib. 202. There was, therefore, no error in the first charge given.—1 Story Contr. § 541; Ath. on Mar. Set. 390.

The first charge asked by the plaintiff was rightly refused. The record recites that the testimony conducted to prove that the real consideration of the agreement was *future* illicit intercourse; while the bill of exceptions does not affirm that there was any evidence which tended to show that *past* intercourse furnished the consideration, either in whole or in part, on which the agreement rested. The charge asked may have been proper, in a case where the testimony left the jury in doubt on the question, whether the consideration was past or future intercourse.

Ath. on Mar. Set. 391. We are not informed that that is this case. In the present record, we are informed of but two facts in this connection; that there was both past and future illicit intercourse, and that the evidence conduced to show that the real consideration of the agreement was the future intercourse. The charge asked ignored an important fact, which the evidence conduced to prove, and, if given, would have justified the jury in finding for the plaintiff, notwithstanding they may have been satisfied the express consideration of the agreement was future illicit intercourse. This not only justified, but demanded its refusal.—Edgar v. McArn, 22 Ala. 796; Pritchett v. Munroe, *ib.* 501; Reese v. Beck, 24 *ib.* 651; Upson v. Raiford, 29 *ib.* 188; Rowland v. Ladiga, 21 *ib.* 9; Ross v. Pearson, 21 *ib.* 473; Hollingsworth v. Martin, 23 *ib.* 591.

If the proof showed that the real consideration of the contract was future cohabitation, then it was to be read as though it had recited that consideration. To establish her cause of action, the plaintiff was forced to rely on the contract; and if that was founded on an illegal consideration, she had no right to recover.—Gunter v. Leckey, 30 Ala. 591. If the plaintiff had been in possession of the slaves, and the administrator of Gregory had sought to recover them from her by suit, possibly the rule would have been different, and she might have protected herself under the maxim, "*potior est conditio possidentis.*"—1 Story's Contr. § 543; Worcester v. Eaton, 11 Mass. 378.

There was no error in the refusal of the second charge asked by the appellant.

Judgment affirmed.

A. J. WALKER, C. J., not sitting.

ROUNDTREE & KIRBY *vs.* SNODGRASS.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Liability of administrator for interest; presumption in favor of judgment.*—On appeal from a judgment of the circuit court, reversing a decree of the probate court,—by which decree an administrator was charged with interest on the money in his hands, although he made the statutory affidavit, (Code, § 1813;) if the record does not show, by bill of exceptions or otherwise, the evidence which was before the probate court, the appellate court will presume that the evidence justified its decision.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. JOHN GILL SHORTER.

THE record in this case shows the following facts: On the 29th May, 1857, the probate court of Jackson granted special letters of administration on the estate of Mary Bird, deceased, to John Snodgrass, and afterwards granted letters of administration in chief to C. B. Roundtree and S. P. Kirby. In February, 1859, Snodgrass made a final settlement of his special administration, and, on that settlement, was charged by the probate court with interest on the money in his hands. From this decree he prosecuted an appeal to the circuit court, where the decree of the probate court was reversed, on the ground that, having made the statutory affidavit denying that he had used the funds in his hands, he ought not to have been charged with interest. From the judgment of the circuit court the administrators in chief now appeal, and here assign the same as error. The transcript from the records of the probate court, on which the action of the circuit court was founded, and which is made a part of the transcript filed in this court, contains an affidavit by said special administrator, purporting to have been sworn to before the probate judge on the same day the decree was rendered, denying that he had used the funds of the estate for his private purposes; but the decree nowhere refers to

this affidavit, nor is there any bill of exceptions in the record.

WALKER & BRICKELL, for appellants.

ROBINSON & JONES, *contra*.

A. J. WALKER, C. J.—Section 1813 of the Code relieves an administrator from the presumption of a liability for interest, upon his making a prescribed affidavit, but authorizes a contestation of the affidavit. If it be conceded that the prescribed affidavit, which is copied into the transcript, is a part of the record, the decree of the probate court, in reference to the charge of interest, must nevertheless, in a revising tribunal, be deemed correct. The record gives us no information, by bill of exceptions or otherwise, as to the evidence before the probate court; and we must intend that there was evidence successfully controverting the affidavit, and that the court decided correctly, rather than that the affidavit was uncontested, and that the court erred.—*Doe ex dem. School Com'rs v. Godwin*, 30 Ala. 242; *Fleming v. Ussery*, *ib.* 282; *Lovett v. Chisolm*, *ib.* 88; *Shepherd's Digest*, 572.

The judgment of the circuit court is reversed, and the cause remanded to that court.

MATTHEWS vs. BAKER.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Location of lands by State, under act of congress of 11th August, 1848.* The act of congress of August 11, 1848, (9 U. S. Statutes at Large, 281,) having placed at the disposal of the legislature of this State, for the use of schools in the valueless sixteenth sections, certain lands theretofore granted to the State for internal improvements, (5 U. S. 455,) and authorized the legislature to locate the same; and

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the legislature having, by the act of February 13, 1850, (Session Acts 1849-50, p. 82,) authorized the issue of certificates of purchase for these lands by the comptroller of public accounts, or by a locating agent,—a certificate of purchase, signed by the governor, and countersigned by the secretary of state, being issued without authority, does not evidence a selection of the land by the State, and cannot defeat a recovery by one claiming under subsequent entry from the United States.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Willoughby Baker, against Randolph Head, to recover the possession of the south-west quarter of the south-west quarter of section nine, in township twelve, range twenty-one. Jehu Matthews was made a defendant, as the landlord of Head, and pleaded not guilty. On the trial, as appears from the bill of exceptions, the plaintiff read in evidence the receipt of the receiver of the land-office at Cahaba, dated August 2, 1855, acknowledging payment by the plaintiff for the land in controversy, at fifty cents per acre. "The defendant then introduced in evidence a certificate for the said land, dated the 21st August, 1850, signed by the governor of this State, and countersigned by the secretary of state, entered by William Johnson, under the act of the legislature approved on the 13th February, 1850, authorizing the entry of certain lands donated by the congress of the United States for the benefit of valueless sixteenth sections; and a quit-claim deed from said Johnson to himself." The plaintiff then read in evidence the depositions of the secretary of state and comptroller of public accounts, "for the purpose of showing that said land was not subject to entry under said act of the legislature of this State." To the former of these depositions the defendant objected, "on the ground that the witness was not the custodian of the records in relation to which he testified," and reserved an exception to the overruling of his objection. "The court thereupon charged the jury, at the request of the plaintiff, that if they believed all the evidence, they must find for the plaintiff; to which

charge the defendant excepted," and which he now assigns as error.

H. W. HILLIARD, for appellant.

PUGH & BULLOCK, *contra*.

A. J. WALKER, C. J.—Conceding that the entire evidence which was before the court below appears to be presented by the record, and that we can therefore revise the charge upon the effect of the evidence, we must decide the question of title against the defendant. Under the act of congress of 11th August, 1848, the legislature had the privilege of locating five hundred thousand acres of land, less the amount previously received.—9 U. S. Stat. at Large, 281; 5 *ib.* 455. The only evidence of a location of the land in controversy is a certificate, under which the defendant claims, signed by the governor, and countersigned by the secretary of state. The act of the legislature of this State of 13th February, 1850, authorizes the issue of certificates by the comptroller, or a locating agent; and it may be (though we do not decide the point) that the certificate of the comptroller or locating agent would be *prima-facie* evidence that the State had selected the land mentioned in the certificate. It is clear, however, that neither the governor nor secretary of state had any authority to issue any such certificate.—Pamphlet Acts of 1849–50, p. 82. The governor's certificate of purchase, being issued without authority, could not evidence a selection of the land by the State; and until the land was selected by the State, the title remained in the general government, and was subject to entry at the proper land-office of the United States. There was, therefore, no error in the charge given by the court.

This view of the question of title renders it unnecessary to consider the questions of evidence made by the appellant, as they could not affect the result.

Judgment affirmed.

PHILLIPS vs. SHERMAN.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Patent to deceased person.*—Under the act of congress of May 20, 1836, (5 U. S. Statutes at Large, 31,) a patent issued in the name of a person then deceased enures to the benefit of his heir, devisee or assignee, and the heir may maintain an action at law on such patent.
2. *Validity and conclusiveness of patent.*—A patent issued under the act of congress of August 26, 1842, “for the relief of John Pratt, or his legal representative,” (6 U. S. Statutes at Large, 865,) cannot be collaterally assailed, in a court of law, on the ground that the person to whom it was issued was not the legal representative of said Pratt; that question having been controverted before the commissioner of the general land-office, and decided by him in favor of the patentee, and his decision having been affirmed by the secretary of the interior on appeal.
3. *Cancellation of patent wrongfully issued.*—When a patent has been wrongfully or erroneously issued, the commissioner of the general land-office may, at any time before its delivery from the local land-office, revoke and cancel it.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by Charles E. Sherman, Joseph H. Russell, and Emma Russell, his wife, against Eldridge R. S. Carter, to recover a lot in the city of Mobile, which was described as a part of section forty-five, township four south, range one west, in the district of lands subject to sale at St. Stephens. Elam Phillips was made a defendant, as the landlord of Carter, and pleaded not guilty. The plaintiffs derived title under a patent from the United States, dated the 10th November, 1854, which purported to be issued under the act of congress approved on the 26th August, 1842, entitled “An act for the relief of John Pratt, or his legal representative,” (United States Statutes at Large, vol. 6, p. 865;) and which, after reciting that Joseph H. Young “appears in the original papers and report of the committee, on which the said act of congress

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was founded, as legal representative and vendee of the said Pratt"—that said Young had entered and paid for the land, and, as the attorney in fact of said Pratt, by deed dated the 12th October, 1842, had conveyed an undivided moiety of his claim to one John A. Chambers, who, on the 9th March, 1852, conveyed his interest to said Charles E. Sherman,—conveyed to said Young and Sherman, each, an undivided half of the land. Mrs. Russell, one of the plaintiffs, was the sole child and heir-at-law of said Joseph H. Young, (who died, intestate, in 1845 or 1846,) and had married her present husband before the commencement of this suit. The defendant impeached the validity of the plaintiffs' patent, on the ground that Sherman was not the "legal representative" of John Pratt, within the meaning of the act of congress above referred to; and claimed title in himself, as a purchaser from said Pratt, under a deed to himself and one Hubbard dated the 12th January, 1846.

The material facts of the case, as shown by the transcripts from the records of the general land-office at Washington and the local land-office at St. Stephens, are these: In June, 1836, John Pratt made application to the land-office at St. Stephens, claiming a preemption right to the tract of land embracing the lot here in controversy. On the 6th December, 1836, said Pratt executed to Joseph H. Young, for valuable consideration, a power of attorney, authorizing said Young to prosecute said preemption claim in his own name, and to sell and convey to others. Under this power of attorney, Young sold and conveyed to John A. Chambers, by deed executed in the name of Pratt by himself as agent, dated the 12th October, 1842, an undivided half interest in the land; and on the 9th March, 1852, Chambers sold and conveyed his interest to Charles E. Sherman. On the 13th September, 1843, Young made application to the land-office at St. Stephens to enter the land under the preemption right of Pratt, claiming to be the legal representative of said Pratt under the act of congress of August 26, 1842; and received from the register and receiver a patent certificate and receipt. On the 12th January, 1846, Pratt sold and

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conveyed the land to Phillips & Hubbard, who thereupon had said deed recorded in the "book of transfers" in the land-office at St. Stephens. On the 5th July, 1850, the register of the land-office at St. Stephens issued a patent certificate for the land to "John Pratt or his legal representative," founded on said entry of the 15th September, 1843, above mentioned. Upon this certificate, on the 12th July, 1850, a patent was issued from the general land-office at Washington, in favor of "John Pratt or his legal representative;" but this patent was never delivered to any one, and was canceled on the 10th November, 1854, when the patent to the plaintiffs was issued. In the meantime, the right to the patent was contested by the rival parties before the commissioner of the general land-office, who decided in favor of the plaintiffs; and his decision was affirmed, on appeal, by the secretary of the interior; and the patent under which the plaintiffs claimed was issued under this decision.

The power of attorney from Pratt to Young, above referred to, was in the following words:

"Know all men by these presents, that I, John Pratt, of the city and county of Mobile, in the State of Alabama, for divers good causes and considerations me thereunto moving, as well as the further consideration of fifty dollars, to me in hand paid by Joseph H. Young, of the city and county aforesaid, the receipt whereof I do hereby acknowledge, have made, constituted, and appointed, and, by these presents, do make, constitute, and appoint the said Joseph H. Young my true and lawful attorney, irrevocably, to ask, demand, sue for, recover and receive any patent, or any documentary or other evidence of title, issuing from the general government, or other land-offices of the United States, to the north-west fractional quarter of fractional section twenty-two, in township four, range one west, south of the thirty-first degree of north latitude; and in my name, place and stead, to prosecute and defend my claim for a preemption to the same, before any land-office, or court of law or equity whatsoever; and in my name to claim, enter upon, and possess the same; and to sell, assign, convey, assure and set over, by proper

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deeds and conveyances, unto himself or any other person, in fee simple, all my right, title and interest, of, in, and to the premises above described, or any part thereof; and the money received, or arising from the sale of the same, or any part thereof, I do hereby direct, authorize and empower my said attorney to use, have, possess and enjoy as his own property; hereby giving and granting unto my said attorney full and whole power and authority in and about the premises, and generally to do and perform all and every act and thing in the law whatsoever needful and necessary to be done in and about the premises, and for me, and in my name, to do, execute and perform, as largely and amply, to all intents and purposes as I myself might or could do, if I were personally present; and an attorney or attorneys under him to appoint, make and substitute, for the purposes aforesaid; hereby ratifying and confirming all that my said attorney, or his substitute or substitutes, shall lawfully do by virtue thereof. In witness whereof," etc.

"Upon the foregoing evidence, the court instructed the jury, that the plaintiffs were entitled to recover in this action; to which charge the defendant excepted," and which he now assigns as error.

E. S. DARGAN, with GEO. N. STEWART, for appellant. Under the act of congress of August 26, 1842, under which the plaintiffs' patent purports to have been issued, a patent for the land could legally issue, only to John Pratt, or to his legal representative; and if issued to neither, the patent is clearly void.—5 Wheaton, 293; 10 Peters, 662. Sherman was not the "legal representative" of said Pratt, within the meaning of said act of congress. The power of attorney, under which he claimed that character, was clearly a conveyance, and was intended to divest Pratt of all beneficial interest in the land. It is not a mere agency, but an actual conveyance, and was so intended; and therefore, under the several acts of congress prohibiting the sale or transfer of preemption claims, it is to all intents and purposes null and void.—U. S. Statutes at Large, vol. 5, pp. 420, 496, 678.

WM. G. JONES, *contra*.—The decision of the secretary of the interior, affirming the decision of the commissioner of the general land-office, on the merits of the rival claims in this case, is conclusive between the parties in a court of law.—Bell v. Hearne, 19 How. (U. S.) 252; Bagnell v. Broderick, 13 Peters, 436; Mitchell v. Cobb, 13 Ala. 137.

A. J. WALKER, C. J.—Joseph H. Young, one of the grantees of the United States in the patent of 10th November, 1854, died before the date of the patent. But, by virtue of the act of congress of 20th May, 1836, the title enured to, and became vested in, his heir.—5 U. S. Statutes at Large, 31; Schedda v. Sawyer, 4 McLean, 181. The only child of Young was, therefore, a proper party plaintiff in this suit, as the owner of the title nominally bestowed by the patent upon her deceased father.

[2.] By the act of congress of 26th August, 1842, "John Pratt, or his legal representative," was authorized to enter the *locus in quo*, at the minimum price of public lands, under his preemption claim.—6 U. S. Statutes at Large, 865. After the passage of this act, the proper departments of the government of the United States, upon the fullest consideration of the question, decided, that Joseph Young was, within the meaning of the act, the "*representative*" of John Pratt; and issued a patent for the land to Young, and to Sherman, who derived his claim from Young. Sherman and the heir of Young, joining in this suit to recover, rest their claim of title upon that patent. The defendant assails the patent, upon the ground that Young was not the "*representative*" of Pratt, within the true meaning and intent of the act of congress; and that the departments of the government of the United States erroneously adjudged the question as to who was Pratt's representative. In support of the proposition that the patent was erroneously issued, the defendant adduced the same evidence that was before the commissioner of the general land-office, and also before the secretary of the interior on the appeal to him, pending the contestation of the right to a patent.

Now, it is manifest that, under the act of congress of 26th August, 1842, the general government had authority to issue a patent for the land; and that it was the duty of the commissioner of the general land-office, subject to an appeal to the secretary of interior, to determine who was the person entitled to a patent under that act. The decision has been made; the patent has been awarded; the patent is not void upon its face; the land was subject to sale, and there was authority to issue a patent. These circumstances existing, it is not permissible that the patent shall be collaterally assailed in a court of law. *Masters v. Eustis*, 3 Port. 368; *Mitchell v. Cobb*, 13 Ala. 137; *Crommelin v. Minter*, 9 Ala. 594, 607; *Wilcox v. Jackson*, 13 Peters, 498; *Bagnell v. Broderick*, 13 Peters, 436; *Bates v. Herron*, at the last term; *McTyer v. McDowell*, at the present term.

[3.] A patent had been issued, previous to that of the plaintiffs; but, after reaching the local land-office, and before its delivery, was recalled by the commissioner of the general land-office, and, being deemed erroneous, was subsequently canceled. The authority of the commissioner of the general land-office to revoke an erroneously issued patent before its delivery, and to correct its error, is maintained, upon reasoning which we deem conclusive, by the supreme court of the United States, in the case of *Bell v. Hearne*, 19 Howard, 252. Therefore, the previous issue of a different patent, which before its delivery was recalled, does not impair the validity of the plaintiffs' title.

Judgment affirmed.

BELL'S ADM'R vs. BELL.

[BILL IN EQUITY BY WIFE'S ADMINISTRATOR AGAINST HUSBAND'S ADMINISTRATOR AND HEIRS.]

1. *When wife's administrator may come into equity.*—The personal representative of the wife cannot maintain a bill in equity, against the personal representative and heirs-at-law of the husband, to recover property which accrued to the wife after her desertion by the husband; which was claimed, held and controlled by her as a *feme sole*; of which the husband never had possession, and to which he never asserted any claim or title.

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.

THE facts of this case, as stated in the bill, are these: John Raiford died, in Monroe county, Alabama, in 1814, leaving as his heirs-at-law his widow, Mrs. Lucy Raiford, and three infant children. His estate was administered upon in said county, by one James Jenkins, "who settled his administration in the orphans' court of said county, in the year 1825, and in the distribution of said estate Mrs. Lucy Raiford received a negro woman by the name of Linda." In 1816, Mrs. Raiford married George W. Bell, in said county of Monroe, and afterwards had two children by him. In 1821, while still residing in said county, "said George W. Bell left and wholly abandoned his said wife; leaving her with five children, without the means of supporting them, except by her own labor." Mrs. Bell soon afterwards removed to Wilcox county, where she lived up to the time of her death, which occurred on the 30th September, 1855, "during all which time she acted as a *feme sole*—managed and controlled her property without any molestation or interference from her said husband, and claimed the property in her possession as her own, to the exclusion of any right in her said husband, who never asserted any right or claim to said property, but permitted her to claim, own and

manage the same as her own property, and to act in regard thereto in all respects as a feme sole." George Bell went to parts unknown, "and nothing was heard of him, until about the year 1845, when it was understood he died in the city of Mobile."

On the 4th October, 1855, William C. Bell, the son of said George W. and Lucy Bell, was appointed by the probate court of Wilcox administrator of said George W. Bell; "not at the instance of any creditor or creditors of his estate, but solely for the purpose of excluding the children of said John Raiford from all participation in the said property;" and, as such administrator, took possession of all the personal property which was in the possession of Mrs. Lucy Bell at the time of her death, including several negroes who were the descendants of the woman Linda, and sold a portion of said property under the order of said probate court. On the 17th December, 1855, James Raiford obtained from said probate court letters of administration on the estate of Mrs. Lucy Bell; and, on the 7th April, 1856, filed his bill in equity against said William C. Bell, both individually and as administrator of said George W. Bell, and the other heirs-at-law of said George W. and Lucy Bell; praying a discovery and account of assets, an injunction of further proceedings in the probate court, a final settlement of his intestate's estate, and general relief.

The chancellor sustained a demurrer to the bill, for want of equity; and his decree is now assigned as error.

WATTS, JUDGE & JACKSON, for appellants.

H. F. DRUMMOND, and L. S. LUDE, *contra*.

STONE, J.—The bill in this case presents the complainant in an inextricable dilemma. If Mr. Bell's marital rights attached to the slaves, then neither Mrs. Bell nor her administrator had any right to them, either at law or in equity. If the marital rights did not attach, then the remedy of the complainant is perfect at law.—*Jenkins v. McConico*, 26 Ala. 213, 246; *Andrews v. Huckabee*, 30 Ala.; *Mason v. McNeill*, 23 Ala. 201; *Machem v. Machem*, 28 Ala. 374.

Robertson & Pettibone v. Johnston.

It is not proper for us to decide whether, on the statements of this bill, the property in controversy belongs to the one estate or the other.—See Cecil & Juxon v. Juxon, 1 Atk. 278; Starrett v. Wynne, 17 Serg. & R. 130, 134; Mead v. Hughes, 15 Ala. 141, 148.

The decree of the chancellor is affirmed.

NOTE BY REPORTER.—This opinion was delivered at the January term, 1858.

ROBERTSON & PETTIBONE vs. JOHNSTON.

[BILL IN EQUITY BY JUDGMENT CREDITORS TO REACH EQUITABLE ASSETS.]

1. *Construction of deed of gift in trust for married woman and "heirs of her body."*—A deed of gift, by which slaves and other personal property are conveyed to a trustee, in trust for the separate use and benefit of the grantor's daughter, then a married woman having children, "and the heirs of her body now begotten and hereafter to be begotten," free from the control, debts and liabilities of her husband: with a further stipulation, that the trustee should permit the daughter to have the possession and control of such portion of the property "as shall and may be necessary for the welfare and comfort of her and her children," but should have power, at his discretion, to take the property into his own possession, "and so to employ and manage the same as shall be to the true interest and benefit of her and her children,"—confers upon the daughter's children, who were living when the deed was executed, an equal and joint interest with their mother, subject to diminution by the subsequent birth of other children.
2. *When debtor's beneficial interest in trust property may be subjected in equity to payment of debts.*—Under a deed of gift, by which slaves and other personal property are conveyed to a trustee, for the separate use and benefit of the grantor's daughter, then a married woman, and her children, free from the control, debts and liabilities of her husband; with a further stipulation, that the trustee "shall and will, at all times hereafter, permit all, or such portion of said property, to be and remain in the possession and under the control of" the daughter, "as shall and may be necessary for the welfare and comfort of her and her children;" pro-

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vided, that the trustee "may and shall, at any and all times, have the right and authority to take possession of said property, should he deem it necessary and proper for him so to do, and to employ and manage the same as shall be to the true interest and benefit of her and her children,"—although no portion of the trust property can be sold for the payment of the daughter's debts, her share of the income and profits may be severed and applied in equity. (RICE, C. J., *dissenting*.)

APPEAL from the Chancery Court at Claiborne.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Robertson & Pettibone, merchants and partners in trade, in behalf of themselves and such other creditors of Mrs. Delilah Johnston as might come in and contribute to the expenses of the suit; and sought to subject to the satisfaction of their debts Mrs. Johnston's interest in certain slaves and other personal property, which were conveyed by her father, William J. Gressett, by deed of gift dated the 22d January, 1843, to Edward C. Gressett, as trustee, upon the following trusts: "To have and to hold to him, the said Edward C. Gressett, his heirs and assigns, to his and their use and behoof, forever; upon trust and confidence nevertheless, and to and for the uses following—that is to say, to the own, proper, separate use and behoof of the said Delilah Jane Johnston and the heirs of her body now begotten and hereafter to be begotten, free from all and every claim or demand, control, debts, liabilities or engagements of her husband, William H. Johnston, which may now, or shall at any time hereafter exist, in any manner, shape or form whatsoever; and also upon this further trust and confidence, and to this intent, that the said Edward C. Gressett shall and will, at all times hereafter, permit all, or such portion of said property, to be and remain in the possession and under the control of the said Delilah Jane Johnston, as shall and may be necessary for the comfort and welfare of her and her children; provided, and it is hereby declared to be the true intent and meaning hereof, that the said Edward C. Gressett shall and may, at any and all times, have the right and authority to take

possession of the said property, should he deem it necessary and proper for him so to do, and so to employ and manage the same as shall be to the true interest and benefit of the said Delilah and her children; and likewise upon this further trust, that provided the said Delilah shall depart this life, leaving no issue of her body at the time of her death, then, and in that case, the said property shall go to and belong to her said husband, William II. Johnston, absolutely; and the said Edward C. Gressett shall, upon the said Delilah so dying, without issue of her body, in the life-time of her said husband, immediately thereafter transfer and convey said property to the said William II. Johnston, in absolute right, subject to no limitations, conditions, or restrictions whatsoever."

At the time when this deed was executed, Mrs. Johnston had two children, who were made defendants to the bill, jointly with her and the trustee, Edward C. Gressett. William II. Johnston died prior to 1850. The complainants' judgment was rendered at the spring term, 1855, of the circuit court of Monroe, and was founded on a promissory note dated the 12th February, 1855, and payable one day after date; which note, the bill alleged, was given for goods, wares and merchandise, sold and delivered by complainants to Mrs. Johnston during the years 1850, 1851, 1852, 1853, and 1854. An execution was duly issued on the judgment, and was returned "no property found;" and the bill alleged that Mrs. Johnston had no property liable at law to the satisfaction of the judgment. The prayer of the bill was, "that the interest and share of the said Delilah in the said trust property may be ascertained, and severed from that of her said children; that the same, or such portion thereof as may be necessary for that purpose, when ascertained, may be decreed to be sold for the satisfaction and discharge of complainants' said judgment;" and for such other and further relief as the justice and equity of the case might require.

The defendants filed separate answers, admitting the material allegations of the bill, and demurring—1st, for want of equity; 2d, for misjoinder of parties; and 3d, for multifariousness.

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On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

TORREY & LESSLIE, for appellants.

No counsel appeared for the appellees.

WALKER, J.—The question of law upon which the decision of this case depends, is, whether the appellee, Mrs. Johnston, has an interest in the property conveyed by W. J. Gressett, or its profits, which it is the province of a court of chancery to appropriate to the payment of her debts, after the creditor has exhausted his remedy at law.

The trusts of the conveyance are, that the trustee hold the property for the use of Mrs. Johnston “and the heirs of her body now begotten, or hereafter to be begotten,” free from the claim, control, debts and liabilities of the husband of Mrs. Johnston; that the trustee should permit all, or such portion of the property, to be and remain in the possession and under the control of Mrs. Johnston, as should be necessary for the welfare and comfort of Mrs. Johnston and her children; provided, that the trustee should have the authority to take possession of the property, should he deem it necessary and proper, and so to manage and employ it as should be to the true interest and benefit of Mrs. Johnston and her children.

The grantor in the deed, in describing the beneficiaries of the trusts created, uses at first the words “heirs of the body *now* begotten, and hereafter to be begotten,” and afterwards the word “*children*.” The phrases *heirs of the body* and *children* are used as synonymous. The intention is also apparent, that the children of Mrs. Johnston should receive and enjoy a vested interest in the trust in the life-time of their mother. *Heirs of the body* must, therefore, be deemed a word of purchase, and not of limitation.—Williams v. Graves, 17 Ala. 62; Powell v. Glenn, 21 Ala. 458; Doyle v. Boulter, 7 Ala. 246; Fellows, Wadsworth & Co. v. Tann, 9 Ala. 999; Darden v. Burns, 6 Ala. 362; 2 Jarman on Wills, m. pp. 13, 14.

The conveyance, then, is in trust for Mrs. Johnston

and her existing and after-born children. The effect of letting in after-born children, as participants in the trust, would not be to postpone any appointed distribution of the property; and in the absence of such an effect, the authorities agree, that the grant to the after-born children is valid.—2 Jarman on Wills, 98, 99, 100; Dunn and Wife v. Bank of Mobile, 2 Ala. 152. Thus understood, the conveyance is for the use of Mrs. Johnston and her children existing and after-born, with the right of possession to Mrs. Johnston of so much of the property as might be necessary for the welfare and comfort of herself and her children; provided that the trustee should have the discretionary power to take possession of the property, and so manage and control it as should be to the true interest and benefit of her and her children. At the time of the conveyance, Mrs. Johnston had two children; she has not since had any. By the conveyance, she and those two children have equal interests of one-third in the benefits provided, which are subject to diminution by the birth of other children, who will be entitled to come in as equal participants with them.—Vanzant v. Morris, 25 Ala. 285; Dunn v. Bank, *supra*.

The terms of this trust will not permit a sale of the specific property belonging to the trust, for the payment of Mrs. Johnston's debts. Such a sale would interfere with and defeat the provision for the possession by Mrs. Johnston of so much of the property as might be necessary for the welfare and comfort of her children as well as herself, and with the discretionary power of the trustee to so manage and control the property as might be to the true interest and benefit of Mrs. Johnston's children as well as herself; and it would interfere with the intention that the children of subsequent birth should come into an equal participation in the enjoyment of the benefits provided in the trusts.—Spear v. Walkley, 10 Ala. 328; Jasper v. Howard, 12 Ala. 652; Fellows, Wadsworth & Co. v. Tann, 9 Ala. 999; Love v. Graham, 25 Ala. 187; Bridges v. Phillips, 25 Ala. 136.

It does not follow, however, because the trust property cannot be sold for the payment of debts, that the interest

of Mrs. Johnston has a perfect immunity from liability to her debts. This case differs in its facts from *Hill and Wife v. McRae*, (27 Ala. 175,) so essentially as to make the decision of that case inapplicable here. The court, in that case, deemed the trust to be for the payment of only so much of the income of the estate as might be necessary for the comfortable and reasonable support of the beneficiary and his wife and children. These persons took no equitable title to the property; they took only a support, to be collectively enjoyed out of the income; any excess of the income, not consumed in that way, was left to accumulate in the hands of the trustee. The right conferred by the trust was simply to an enjoyment, in common with the wife and children, of a comfortable support. There was no distinguishable property susceptible of identification conferred. It is here very different. The entire use and benefit derivable from the property is bestowed upon the beneficiaries. Whatever income or profit may accrue during the life-time of Mrs. Johnston, is secured to her and her children. Although the income might be a hundred fold more than is necessary for the maintenance of her and her children, it belongs to them.

The question whether such an interest is liable to debts, is answered by the well considered decision of the majority of this court, in *Rugely & Harrison v. Robinson*, (10 Ala. 702,) which the court, in *Hill and Wife v. McRae*, expressly disclaim any intention to overrule. With a reservation that there should be no liability to the payment of debts, the trustee was directed by the will, in *Rugely & Harrison v. Robinson*, to pay over the rents and profits of the property for the use and benefit of Eli T. Robinson and his family. It was held, that Eli T. Robinson had an interest, which might be reached by his creditors. That case is in every essential particular the same with this. We have examined the arguments adduced and authorities cited in the decision of it, and are convinced that they fully vindicate the opinion expressed by the court.—See, also, *Spear v. Walkley*, 10 Ala. 328; *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. 999. We fully endorse the sentiment expressed by Judge Ormond

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in that case: "That a beneficial interest cannot be given to one so that it cannot be reached by his creditors, unless such interest is conferred and is to be enjoyed jointly with others, and is also incapable of severance." The policy of the law wisely forbids that the ownership of property should be further shielded by an exemption from liability to debts unless to the limited extent authorized by our statutes.—*Bank v. Forney*, 2 Ired. Eq. 184; *Hallett v. Thompson*, 5 Paige, 583; *Rippon v. Norton*, 2 Beavan, 63; 2 Story's Eq. Ju. § 974 *a*.

The decree of the court below is reversed, and the cause remanded, in order that the chancellor may cause an appropriation of Mrs. Johnston's share of the hire, rents, profits and income of the trust estate to the payment of the complainants' debt, until it is discharged.

RICE, C. J., *dissenting*.

NOTE BY REPORTER.—This case was decided at the June term, 1858. The papers were for some time mislaid.

HARRISON vs. BOYD.

[ACTION BY WIDOW, AGAINST HUSBAND'S ADMINISTRATOR, TO RECOVER RENTS OF DWELLING-HOUSE.]

1. *Presumption in favor of judgment*.—Where the rulings and judgment of the circuit court can be sustained under the provisions of the Code, but not under the former law, the appellate court will presume, unless the record repels such presumption, that the facts of the case brought it within the provisions of the Code.
2. *When the widow is entitled to dower*.—Under the Code, (§ 1354,) the widow is not entitled to dower in lands which were purchased by her husband at an administrator's sale, but of which he never received any conveyance, not having made full payment of the purchase-money at the time of his death.
3. *When widow is entitled to rents of dwelling-house*.—The widow's

statutory right to retain the possession of the dwelling-house in which her husband most usually resided next before his death, with the adjacent plantation, (Code, §§ 1359, 1354, 1367,) and her consequent right to recover the rents thereof, attach only to the premises of which she is dowable.

4. *What law governs right of dower.*—Authorities cited on the question, whether the widow's right of dower is governed by the law which was of force at the time of the husband's death, or by that which was in existence at the time of the marriage and acquisition of the land.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. E. W. PETTUS.

THIS action was brought by Mrs. Lucy A. Harrison, widow of Reuben Harrison, deceased, against William E. Boyd, the administrator of said Reuben Harrison, "to recover the sum of \$2,000, for the rent of the plantation on which the said Reuben Harrison most usually resided next before his death, from the 29th May, 1854, when said Reuben departed this life, up to the 16th January, 1857, the day on which plaintiff's dower in said plantation was set apart." The defendant pleaded, "in short by consent—1st, *non assumpsit*; 2d, that plaintiff has had possession of said house and plantation since the death of her husband, and that defendant cultivated said plantation during the time he occupied the same, at her request and urgent solicitation, and for her benefit; 3d, that plaintiff has received the value of the rents of said plantation, before the bringing of this suit, in the negroes to which she is entitled as a distributee of the estate; and, 4th, that defendant had possession of said land as administrator of the estate of said Reuben Harrison, and cultivated the same for the benefit of plaintiff and the heirs of said Harrison, who were tenants in common thereof, and has fully paid over and accounted, as such administrator, to the plaintiff and the heirs of said Harrison, for the rents received and profits of said plantation." Across the face of the third plea, as copied in the transcript, are written the words, "demurrer sustained;" but the record nowhere else mentions any demurrer.

The facts of the case, as stated in the bill of exceptions, are these: The lands in controversy belonged to one Richard B. Harrison at the time of his death, and were sold by his administrator, under an order of the probate court, on the 20th February, 1849. Reuben Harrison, the plaintiff's husband, became the purchaser at said sale, and executed his note, with surety, for the purchase-money; but died on the 29th May, 1854, without having paid any portion of the purchase-money. After his death, the defendant, as his administrator, paid the purchase-money in full, "but no titles were ever made to said lands." "There was evidence tending to show, that the defendant, at the request of the plaintiff, did not sell the slaves belonging to the estate of his intestate, but worked them upon said land, from the — day of —, until the 7th day of February, 1857, when the plaintiff's dower was regularly assigned to her, upon proceedings instituted by her in the probate court of Dallas; and that the defendant, at the request of plaintiff, applied the proceeds of the crops raised by him on said lands in payment of the debts of his intestate; also, that plaintiff resided on said land, from the day on which her said husband died, until the 5th day of March, 1856; that she then removed to Benton, where she resided until November of the same year, and then returned to, and has lived upon said plantation ever since; and that while living on said plantation, she received her supplies of provisions for herself and children, and for her carriage-horses, from the proceeds of said plantation; but there was no evidence that she ever worked, cultivated, or rented out any portion of said lands."

"The court charged the jury, that if they found from the evidence that Reuben Harrison bought said lands at an administrator's sale, and gave his note for the purchase-money, but had not paid the purchase-money at the time of his death, and had no legal title to said lands, then his widow was not entitled to dower in said lands, and could not recover in this action for the rents of said lands." The plaintiff excepted to this charge, and took a nonsuit; and she now assigns said charge as error, and moves to set aside the nonsuit.

JNO. D. F. WILLIAMS, for appellant.

D. S. TROY, *contra*.

STONE, J.—It is settled by an array of authorities, too strong to be questioned, that marriage is a valuable consideration; and that the respective rights and claims of the husband and wife, in and upon each other's property owned at the time of marriage, stand on the same principle as the rights of other purchasers for value.—Huston v. Cantril, 11 Leigh, 136; Magniac v. Thompson, 7 Peters, 348; Barr v. Hill, Addison, 276; Ramsay v. Joyce, 1 McMillan's Eq. 236; 1 Parsons on Con. 357; Sterry v. Arden, 1 John. Ch. 261; Whelan v. Whelan, 3 Cow. 537.

It is also settled that, in the absence of an express ante-nuptial contract, when parties intermarry with the intention of fixing their domicile in a particular place, and carry that intention into effect, the law of that place determines their several rights in the property then owned by each, or afterwards acquired without change of domicile. If they subsequently remove to a new legislative jurisdiction, any after-acquisitions of property, in the absence of limitation, or a contract *inter sese*, will be governed by the laws of the new domicile. We cite, without comment, the authorities in support of these propositions.—Sand v. His Creditors, 5 Martin's La. (N. S.) 569; Lyon v. Knott, 26 Miss. 548; Depas v. Mayo, 11 Missouri, 314; Story Con. of Laws, §§ 148, 149, 150, 151, 172, 173, 174, 176, 177.

It will be observed, that this case does not raise any question on the effect of our statutes known as the "woman's laws," on the propositions above asserted. Whether these statutes, in cases coming under their influence, require the application of a different rule, we are not called upon now to consider.

Lest the generality of the expression, "property then owned," as stated in our second proposition above, should mislead, we here remark that, of course, the rule there declared does not apply to real estate situated in another jurisdiction. The right to lands is governed by the law of the place where they are situated.

This record is entirely silent on the question *when* Mr. and Mrs. Harrison intermarried. All it affirms is, that Mr. Harrison died in 1854, leaving appellant his widow. Being bound, by an unbroken chain of decisions, to indulge every reasonable intendment in favor of the ruling of the primary court, we must suppose that Mrs. Harrison's claim of dower is to be determined by the provisions of the Code, as those provisions are somewhat variant from our former legislation on the subject.

The language of the Code is: "§ 1354. Dower is an estate for the life of the widow, in a certain portion of the following real estate of her husband, to which she has not relinquished her right during the marriage: 1st, of all lands of which the husband was seized in fee during the marriage; 2d, of all lands of which another was seized in fee to his use; 3d, of all lands to which, at the time of his death, he had a perfect equity, having paid all the purchase-money thereof." It is manifest that at no time was Mr. Harrison seized in fee of the lands mentioned in the record; nor had he paid all the purchase-money. Hence, the claim of Mrs. Harrison is not supported by either the 1st or the 3d subdivision of section 1354. She must, then, base her claim on the 2d of the subdivisions, or it has no foundation.

We confess that we are unable to detect any material distinction between the provisions of the 9th section of the act of 1812, (Clay's Digest, 157, § 36,) and subdivision 2 of section 1354 of the Code, so far as they bear on this question. The act of 1812 has received a uniform construction in this court, from which we do not feel at liberty to depart. That construction is, that its operation is not confined to those estates of which one man is technically seized to the use of another, as embraced in the English statute of Henry VIII., called the statute of uses. Our statute was held to embrace all cases, where the title to lands was in another, or in the government, and the husband had such interest and claim thereto that in equity he could compel its conveyance to him. Of all such lands the widow was dowable, under the act of 1812.—*Shields v. Lyon*, Minor, 278; *Gillespie v. Sommerville*, 3 S. & P.

447; and authorities collected Reav. Digest, p. 459; Shep. Digest, p. 142.

The Code, however, renders it necessary that we should declare a different rule. If we give to the 2d subdivision of section 1354 the same construction which has uniformly been given to the act of 1812, we leave no field on which the 3d subdivision can operate. We do not feel at liberty to deprive it of all operation, more especially as the construction of the act of 1812 has never been fully satisfactory. We, then, confine the operation of the 2d subdivision of section 1354 to technical seizures to use, as understood in the English jurisprudence. It results from what we have said, that Mr. Harrison never had such a title to the lands mentioned in the record, as that his widow could claim dower in them under the provisions of the Code.

It is contended for appellant, that her claim for rent should have been maintained, even if it be conceded that she was not entitled to dower in the lands. This argument is based on section 1359 of the Code. The language of this section, considered alone, is sufficiently comprehensive to embrace all cases. If, however, we give to it the construction for which appellant contends, it places the widow, whose husband died in possession of lands to which he had not such title as would support her claim to dower, on much more favorable grounds than if her claim to dower was perfect. In the one case, she would hold, "free of rent," the homestead and entire "plantation connected therewith," without limit as to time; for dower never could be assigned to her. In the other, the heir, by having her dower allotted to her, could reduce her possession to a life-estate in one-third of the real estate. We think section 1359 must be construed in connection with sections 1354 and 1367, and that the widow has no right to retain the premises, "free of rent," unless there was also a real estate in the husband, out of which she could have dower assigned to her.

There is, perhaps, another defect in the right of the plaintiff, as shown by this record. It does not appear from the bill of exceptions, that the *dwelling-house and plantation*

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connected therewith, are those where the "husband most usually resided next before his death."—Code, § 1359.

It is further contended, that inasmuch as the seizin of Mr. Harrison was considered and necessarily passed on in the proceedings to lay off the dower of Mrs. Harrison, Mr. Boyd, the administrator, is estopped by the recovery in that case from disputing the seizin of his intestate. We do not now decide this question. Neither that record, nor the proof in this case, establishes the fact, that the lands which are the subject of this suit were the place where Mr. Harrison most usually resided next before his death. In the proceedings in dower, this latter inquiry would have been immaterial; and consequently, the doctrine of estoppel probably does not apply to the case as made by this record.—See *Chamberlain v. Gaillard*, 26 Ala. 504. Even if the appellant be right in the legal argument he makes on the doctrine of estoppel, it cannot aid him in this case, because of the defect of proof above noticed. We reserve our opinion on this legal question until it shall come properly before us.

It is shown in this record, that Mr. Harrison acquired all the title he ever had to these lands, long before January 17, 1853, when the Code went into operation. If his marriage with the appellant took place before that time, it may become a material question, whether her claim of dower and quarantine is to be determined by the act of 1812, or by the provisions of the Code. We do not now decide this question, but, in addition to the authorities cited above, we refer to the following, without intending thereby to intimate an opinion: *Reynolds v. Reynolds*, 24 Wend. 193; *Randolph v. Doss*, 3 How. (Miss.) 205, 214, 215; 1 *Roper on Husband and Wife*, 527; *Torrence v. Cooley*, 27 Miss. 697; *Jackson v. Waltermire*, 5 Cow. 299; *Bullard v. Bowers*, 10 N. H. 500; *Stanwood v. Dunning*, 2 Shep. 290; *Hobbs v. Harvey*, 4 Shep., 80; *Campbell v. Knight*, 11 Shep. 332; *Collins v. Torrey*, 7 Johns. 278; *Sleight v. Read*, 18 Barb. 159; *White v. White*, 5 *ib.* 474; 17 *ib.* 660; 4 *Sandford*, 461.

The judgment of the circuit court is affirmed.

NOTE.—This case was decided at the June term, 1858.

REPORTS

OF

CASES ARGUED AND DETERMINED

AT JUNE TERM, 1860.

MOSE (A SLAVE) *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Entering plea of not guilty for prisoner.*—Where a prisoner, having been duly arraigned, and having pleaded not guilty on his first trial, refuses to plead anew on a second trial, the court may cause the plea of not guilty to be entered for him.
2. *Change of venue.*—The statute authorizing a change of venue in a criminal case, (Code, § 3008,) applies to and includes slaves.
3. *Admissibility of confessions.*—Where a witness testifies, that he went to see the prisoner, after his arrest, at the instance and request of the latter, and found him confined and chained; that in reply to an inquiry why he had sent for him, the prisoner referred to an informal preliminary examination, at which the witness had assisted, admitted that his denial of guilt on that occasion was false, and proceeded to confess his guilt; and that he did not know of any promises or threats previously made to the prisoner,—this is sufficient, *prima facie*, to show that the confessions were voluntary, and to authorize their admission as evidence before the jury.
4. *Same.*—The confessions of the prisoner in this case, who was a slave, held to have been properly received in evidence under the facts disclosed in the record, notwithstanding promises of favor made by his master several weeks previously, and threats of vio-

lence by third persons on the day before such confessions were made.

5. *Withdrawal of jury pending preliminary investigation by court touching admissibility of confessions.*—There is no rule of law, which requires that, pending the preliminary investigation by the court as to the competency and admissibility of confessions, the jury should be made to withdraw: if a case should arise, in which the ends of justice demanded that such a course should be pursued, an appeal must be made to the enlightened discretion of the presiding judge.
6. *Relevancy of evidence corroborating confessions of prisoner and dying declarations of deceased.*—The fact that a buckshot, of the size admitted by the prisoner to have been used by him in shooting the deceased, was found a month afterwards, lodged in a tree near the scene of the murder, within the range of a gun discharged under the circumstances detailed in the dying declarations of the deceased and in the confessions of the prisoner, is relevant evidence, as corroborating those declarations and confessions.
7. *Mode of impeaching or sustaining character of slave witness.*—Where the general character of a slave for truth and veracity is in issue, a witness who is acquainted with his character in the family in which he lives, "consisting of seven or eight whites and about fifty blacks," is competent to testify.
8. *Same.*—But a witness who states, on cross-examination, "that what he meant by general character was the way he conducted himself, what his own master said, and what he himself knew of him," is not competent to testify to the character of such slave.
9. *Charge on sufficiency of evidence.*—A charge to the jury, instructing them that they must find the prisoner not guilty, "unless the evidence against him was such as to exclude to a moral certainty every supposition (or hypothesis) but that of his guilt," asserts a correct legal proposition, and ought to be given at the request of the prisoner.
10. *Same.*—But a charge which asserts that he is entitled to an acquittal, "unless the evidence against him was such as to exclude to a moral certainty every possible hypothesis but that of his guilt," is erroneous.
11. *Weight of confessions as evidence.*—The *corpus delicti* being otherwise established, a conviction may be had on the prisoner's confessions alone, if free, voluntary, and satisfactorily proved.

FROM the Circuit Court of Perry.

Tried before the Hon. PORTER KING.

THE indictment in this case was found at the fall term, 1858, of the circuit court of Dallas, and charged the prisoner, Mose, *alias* Moses, a slave, with the murder of

Martin Oaks, a white person. The prisoner was arraigned at the same term, and pleaded not guilty; and, on a subsequent day of the term, on his application, the venue was changed to Perry county, where, at the fall term, 1859, he was tried and convicted; but the judgment of conviction was reversed by this court, at its January term, 1860, and the cause remanded.—See the case reported in 35 Ala. 421. At the spring term, 1860, of said circuit court of Perry, as the bill of exceptions in the present record shows, “when the case came on to be heard, the defendant announced himself ready for trial, on his plea of not guilty, pleaded in Dallas circuit court before the venue was changed. The court required him to plead over to said indictment, but he declined to do so; and the court thereupon entered the plea of not guilty in his behalf, against his protestations; to which ruling of the court the prisoner excepted.”

The deceased was the overseer of a plantation in Dallas county, belonging to Mr. Vasser, who was also the owner of the prisoner; and was shot on the 26th July, 1858, about 9 o'clock at night, as he was riding from the house of his employer to the plantation, and died on the next morning. At that time the prisoner was run away, but he voluntarily returned to his master about a week afterwards. After proving the dying declarations of the deceased, as to the circumstances attending the shooting, “the State introduced as a witness one Hardy, a slave, the property of one Walker, who testified, that on the night said Oaks was killed, Mose came to him, near his (Hardy's) master's, having a gun, and told him that he had shot Oaks that night with said gun—that he had loaded it with fifteen buckshot, a rifle-ball, and a slug, and that the other barrel was loaded in the same way. The State also offered one Jennings as a witness, who testified, that about one month after the death of the deceased, while Mose was confined at Pleasant Hill, in Dallas county, he went to see him, between ten and twelve o'clock on Monday morning, at the instance of said Mose; that he found Mose confined in a little room back of a grocery, with a chain passing around his neck by one end, and the other

end fastened to the house, handcuffed, and perhaps otherwise secured; that on entering the said room, he said, 'Well, Mose, what do you want with me;' and that Mose replied, 'Mass Edmund, I have known you a long time; we are members of the same church. You examined me very closely on the other trial. I then told you a lie; I now want to talk to you as a church member.' Said witness stated, also, that he knew of no promises or threats made to the prisoner. The State then offered to prove, that the prisoner then made confessions of his guilt to said Jennings. The prisoner objected, and insisted that said confessions were not shown to be voluntary. The court overruled said objection, and held said confessions, *prima facie*, voluntary and admissible, (the above being all the evidence on the point;) to which ruling the defendant excepted. The prisoner then offered to prove, that the confessions to said Jennings were not voluntary, but were illegally obtained, and were inadmissible; and the court decided to hear said evidence before hearing said confessions. The prisoner then asked the court to direct the jury to withdraw, so that they might not hear the preliminary examination aforesaid for the above purpose; but the court refused to do this, and the prisoner excepted."

"To show that the confessions to said Jennings were not voluntarily made, the prisoner then proved to the court the following facts and circumstances: When the prisoner, who was a runaway at the time said Oaks was killed, returned to his master on the eighth day afterwards, his master cursed him, struck him in the face with his fist, and made it bleed; told him that he believed he had shot Oaks, and that he was going to send him to the vigilance committee; that he hoped they would hang him, and that he should never see him again; and then bound him securely with cords, and sent him to said committee at Pleasant Hill, which was their head-quarters. Said committee examined and discharged him, and he returned to his master's that evening. His master, still believing that he was guilty, kept him chained the balance of the week; and, after keeping him so confined for several days,

stripped him while tied, cursed him, and told him that he would make him tell about the murder of Oaks, or kill him. The prisoner denied the charge, and insisted that he was innocent, and, at length, so satisfied his master of his innocence, that, after striking him once or twice with a whip, and seeing that he was badly frightened, he let him go, and sent him down to the plantation. Afterwards, when he had been at work about a week on said plantation, his master had another interview with him, and, in order (as he testified) to induce him to tell what he knew about the murder of said Oaks, told him, that if he would tell him all about the killing of said Oaks, he would run him off, and he should never be hurt for any part he took in it; but the prisoner again denied that he knew anything about it, or had any part in killing said Oaks. After the prisoner had been at work on said plantation for two or three weeks, one Riggs went to the plantation to arrest him; walked up to him on Sunday afternoon, laid his hand on him, and said, 'You are the boy I am after. Walker's boy has been taken, and the murderer of Oaks has been found out.' The prisoner then again denied that he had killed Oaks. Riggs then carried him to his master's residence. His master, being very much excited, on account of having heard that Hardy had confessed that the prisoner had killed said Oaks, then cursed him again, and told him that he believed he was guilty of said crime, and that he and Hardy were both guilty; that he was going to send him again to the vigilance committee, and hoped that they would hang or burn him; that he would give \$200 to have him hung; that he would hang him, and Hardy too, before the night after the next day; that he would hang him himself, if nobody else would, if he was proved guilty; and that he need not look for or expect any further assistance or protection from him. While his master was thus talking to him, the prisoner was securely tied, and had his arms pinioned to his sides; and he was carried to Pleasant Hill the same evening, and delivered to the vigilance committee, who took charge of him, and kept him in the bar-room of the hotel that night; several of the committee staying with

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him to guard him. He was fastened with a chain around his neck, had on handcuffs, and was tied with a rope. Many persons talked with him that night, and asked him a great many questions; but about what, the witness could not say. The persons who so interrogated him, passed in and out, and asked him such questions as they thought proper to ask. On the next morning, the prisoner was carried from the hotel to a room back of a grocery in the village, where he was kept confined in the same manner; and many persons there continued to interrogate him, passing in and out, and asking such questions as they pleased. One Thomas B. Somerville testified, that threats of violence were used towards him while confined at Pleasant Hill, in charge of said Somerville, before any confessions were made by him; that the prisoner knew such threats were made before said time; that he (witness) told him he ought to be hung, and that there were men then engaged in trying to make up money to pay for him, and hang him right there, without judge or jury; that he also told him, 'Mose, you are in my charge, and I will treat you as well as I can while you are;' and that all this occurred before any confession was made.

"One Carson was then introduced, and testified, that he and Mr. Rives, having been sent for by Mose, went to see him about eight o'clock on Monday morning; that Mose then appeared to be much distressed and wearied, and said to them, 'that he felt badly, and was tired—please to fix a place for him to rest, that he wanted to sleep a little, so that he could compose his mind; and to return in about an hour, as he wanted to talk to them, and to let no other person come with them.' Witness and Rives then retired from the room, closed the door, and went off. When they returned, about an hour afterwards, and re-entered the room, Mose roused up, and appeared to have been asleep. One of them asked him how he felt; to which he replied, that he felt better. One of them then asked him, if he was ready to talk to them now; and he replied, that he was. One of them then asked him, what he had to say; and Mose then asked him, if there was any chance for a man who had committed murder to get to

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heaven ; to which one of them replied, that he did not know—there might be mercy, but he would have to repent. Mose then said, that he had done a great deal of hard praying, and did not want to miss heaven. Carson then told him, to be particular not to tell anything against himself; that so far as he was concerned, they were satisfied. Mose then asked them, if it would be any harm for them to tell him what the man had witnessed against him; and Carson said, they would not tell him. Mose was then silent for a while, when Carson said to him, ‘Well, Mose, as you seem to have nothing to tell on any body else, you must be the guilty one;’ and, as Carson testified, Mose then went on to make his confession. On cross-examination of said Carson by the State, the counsel for the State insisted, that the confession itself would show that it was voluntary, and asked the witness to state the confession to the court for this purpose. The prisoner objected to said witness giving said confessions in evidence for this purpose; the court overruled the objection, and the prisoner excepted. Under this ruling of the court, said Carson then stated, that Mose said, in answer to his remark last above mentioned, ‘It is a certain matter that I shot Mr. Oaks;’ and, in answer to questions asked him, then went on to state, that he shot him from the inside of the fence corner, on the way from his master’s house to the plantation, on Sunday night; that Oaks was not more than six or seven feet from him when he shot; that he had a double-barreled gun, but did not shoot the second barrel, because the gun kicked him on the nose, and confused him so that he could not do it; that he followed on after Oaks until he got close to the house on the plantation, when one of the negroes on the place, named Rocko, came to him, and asked if it was he that had shot Mr. Oaks; that he told him it was, and Rocko said he thought so; that he had waylaid Mr. Oaks at the same place, on Sunday night two weeks before, but did not shoot because Mr. King was with him; that he also waylaid him once in a ditch in the field, but did not shoot him then because his master was with him; that no person was with him on the night he shot the deceased; that

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he got with the boy Hardy that night, and stayed with him next day around Shiloh church; that they went to Selma on the next (Monday) night, and stayed about there until Wednesday, when they came back; that on Thursday morning they met with Dr. Townsend's Will, who told them that Mr. Oaks was dead; that when he came home to his master Hardy had the gun; that he saw Hardy the next week afterwards, and got the gun from him, to prevent Hardy from killing his own overseer with it, as he said he intended to do, and hid it, with some shot and powder, in a chesnut log between his master's field and Mr. Walker's; and that he killed the deceased because he was a hard down man on him, and said he was going to be harder. Carson and Jennings both testified, that the prisoner made no allusion, in his confessions to them, to the threats or promises previously made to him by his master. Carson stated, that he, Rives and Mose were all members of the same church. It was proved, that the confessions to Carson and Rives were made before the confessions to Jennings. Major Vasser, the owner of Mose, further testified, that he was a very timid negro, and had been from childhood; that when brought out for trial on Tuesday after his arrest by said Riggs, and after the confessions made to Jennings and Carson, he (witness) was present, and heard many threats made against Mose, in his (Mose's) hearing, to the effect that the people at Pleasant Hill would hang him there, and that a purse would be made up to pay for him; that it was in fact agreed between said Vasser and others, that both Mose and Hardy, then being present, should be taken to the place where Oaks was killed, and there burned; and that Mose was so greatly alarmed that he could hear his heart beat seven or eight feet distant.

This was all the evidence introduced, on either side, showing the circumstances under which the prisoner's confessions were made. The prisoner thereupon insisted, before the court, that the same were not voluntary, and should not be allowed to go before the jury as evidence; but the court overruled the objection, and held such confessions to be admissible evidence; to which the prisoner

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excepted. The prisoner's said confessions, as made to the witness Carson, were then introduced in evidence to the jury, against the prisoner's objection; and he excepted to the ruling of the court in allowing them. The State then offered to prove, that on the same day, but subsequent to the time testified to by said Carson, the prisoner made another confession to the witness Jennings. To this the prisoner objected; the court overruled his objection, and he excepted. Said Jennings then testified, that having gone to see Mose, on being sent for by him, on said Monday, Mose told him, that he had sent for him because they were members of the same church, and because he had told him lies when first questioned by him before the vigilance committee—that he had told him he had not killed Mr. Oaks, when he had; that he had also told him he had skinned his nose in falling down a bluff, which was not true, as his nose was in fact hurt by the kicking of the gun when he shot Mr. Oaks; also, that he had waylaid Mr. Oaks at the same place, on Sunday night two weeks before, and would then have shot him if Mr. King had not been along with him. The prisoner objected to these confessions as evidence, because obtained under the influence of the first confession, and because not voluntary, and moved to exclude the same from the jury; but the court overruled the motion, and the prisoner excepted.

“One Wiley then testified, that on said Monday, at Pleasant Hill, Mose told him where said gun was, and that there was powder and shot with it. One Quarles testified, that about one month after Oaks was killed, he and another person found one buckshot in a pine tree about thirty-five feet from where Oaks was killed, and very nearly in the range of a gun, if shot from the corner of the fence above mentioned, at a man six or seven paces from it going in the road towards the houses on the plantation; and that he cut out the chip containing it, which he exhibited to the court and jury. To all this testimony of said Quarles the prisoner objected, and moved the court to exclude it from the jury; but the court overruled the motion, and the prisoner excepted.

The prisoner offered evidence of his own good character, and also evidence impeaching the general character of the witness Hardy, showing it to be bad, and contradicting sundry statements made by him. The State then introduced John Wiley as a witness, and asked him, whether he was acquainted with Hardy's general character for truth and veracity in the neighborhood where he resided and was known. The witness answered, that he did not know Hardy's character in the neighborhood, but knew his character in the family in which he (Hardy) lived; and, when asked the size of said family, replied, that it consisted of some eight or ten whites and about fifty blacks. The counsel for the State then asked him, whether said character was good or bad; and the witness answered, that his character in said family was good. To this question and answer, each, the prisoner objected, and excepted to their allowance by the court. One Buster was also called as a witness to the character of said Hardy, and testified, on his direct examination, that he was acquainted with said Hardy's general character for truth and veracity among his neighbors; that it was good, and that he would believe him on oath. Said witness testified on cross-examination, that what he meant by general character was the way he conducted himself, what his own master said, and what he knew of him himself. The prisoner then moved the court to exclude the direct testimony of said witness from the jury, on the ground that he was not competent or qualified to speak of Hardy's character; but the court overruled the motion, and the prisoner excepted.

"The court charged the jury, among other things:

1. That every one charged with the commission of an offense against the law, is presumed innocent until his guilt is established by the evidence; and that the prisoner, though a slave, was as much entitled to the benefit of that presumption as if he were a white man.
2. That unless the evidence was so convincing as to satisfy their minds of the prisoner's guilt beyond all reasonable doubt, they must return a verdict of not guilty.
3. That if, in view of all the facts and circumstances proved, they entertained

a reasonable doubt as to the truth of the confessions, they may disregard them in their decision of the case, as being incredible, although they cannot reject them as incompetent; and if they entertained no such reasonable doubt, they ought not to disregard them, although they may believe that said confessions were obtained by the appliances of hope or fear to the prisoner's mind.

"The prisoner asked the court to charge the jury—

"1. That if the the deceased was killed in Dallas county, then they must find the prisoner not guilty.

"2. That if they find there is no evidence of the fact that the prisoner shot the deceased, except his own confessions; and that his confessions to Carson and Jennings were made when he was confined and chained at Pleasant Hill, fifteen or more hours after his arrest, and after he had made the request of Carson and Rives to be left alone for one hour and then he would talk with them, and after his master had made the promises and threats testified to by him, and after the threats at Pleasant Hill testified to by the witness Somerville, and after what said Somerville had said to him,—then they would not be authorized to find the prisoner guilty on the confessions made to Hardy, unless they believed said Hardy to be worthy of credit.

"3. That unless the evidence against the prisoner should be such as to exclude to a moral certainty every supposition but that of his guilt of the offense imputed to him, then they must find him not guilty.

"4 That unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find him not guilty.

"5. That unless the evidence against the prisoner should be such as to exclude to a moral certainty every possible hypothesis but that of his guilt of the offense imputed to him, they must find him not guilty.

"6. That if they should find that there is no evidence of the fact that the prisoner killed the deceased, except his own confessions, then they should find him not guilty.

"The court refused each one of these charges, and the prisoner excepted to the refusal of each."

I. W. GARROTT, for the prisoner.—1. The prisoner had the right to be tried on his own plea of not guilty, interposed at the time of his arraignment, and the court erred in putting in another plea for him. Section 3574 of the Code has no application to the case, because the prisoner had pleaded when arraigned. Injury must be presumed from this error, since the record does not show enough to repel the presumption.—Spivey v. McGehee, 21 Ala. 417; Sackett & Shelton v. McCord, 23 Ala. 851; Hines v. Trantham, 27 Ala. 359; Thomas v. DeGraffenried, 27 Ala. 651.

2. The witness Jennings found the prisoner confined in a house, handcuffed, and with a chain around his neck; and his confessions while in that condition, without inquiry as to the treatment to which he had previously been subjected, or as to the promises or inducements which had been held out to him, were held to be *prima facie* admissible. That this was erroneous, see Brister v. The State, 26 Ala. 107; Wyatt v. The State, 25 Ala. 12; 1 Green. Ev. § 219.

3. The court should have directed the jury to retire while it heard the evidence preliminary to the admission of the confessions. No mind, however well trained, can hear a detailed statement of facts, without retaining impressions made on it; and it is not to be expected that jurors will be free from this infirmity.—Smith v. The State, 9 Humph. 17, 18; Florey v. Florey, 24 Ala. 247; Carlisle v. Hunley, 15 Ala. 625-6.

4. The prisoner's confessions were not competent evidence, under the facts disclosed in the record. It is shown that his master had at first attempted to compel him to confess by threats and punishment; that he then changed his tactics, and endeavored to procure confessions by bribes and promises; that the prisoner was then arrested, and delivered to the vigilance committee, chained and handcuffed; and that he was kept in this condition until the next day, when nature was exhausted, and the confessions were at last obtained. Is it remarkable that, circumstanced as he was,—abandoned by his master and

only protector, and in the power and custody of an infuriated mob, who were thirsting for his blood,—he gave way to his hopes or fears, and made the confessions which secured his conviction? As to the admissibility of evidence thus obtained, see 2 Russell on Crimes, 826–28; Roscoe's Cr. Ev. 39–40; 1 Greenl. Ev. § 220; Bob v. The State, 32 Ala. 566–8; Wyatt v. The State, 25 Ala. 9; Brister v. The State, 26 Ala. 107.

5. The confessions to Rives and Carson having been improperly obtained, the subsequent confessions to Jennings, made on the same day, were also inadmissible. Authorities *supra*.

6. The testimony of Quarles was irrelevant. It is not the fact that a thing is found as confessed by the prisoner, but his knowledge of the existence of the fact, that tends to show guilt.—1 Greenl. Ev. §§ 231–32.

7. The testimony of Wiley and Buster, as to the prisoner's character, was illegal.—1 Greenl. Ev. § 461; 1 Phil. Ev. 212, 491; 2 C. & H. Notes, 767; Dave v. The State, 22 Ala. 23.

8. The statute authorizing a change of venue, does not include slaves. Section 3612 requires a payment in money, with which a slave cannot comply. Section 3305 is a legislative construction of statutes, showing that they do not generally include slaves. See, also, Eskridge v. The State, 25 Ala. 33; Cobb on Slavery, §§ 91–94.

9. Confessions are not, of themselves, sufficient to authorize a conviction; there must be, at least, additional proof of the *corpus delicti*. The 2d and 6th charges asked, should have been given.

10. The 3d and 4th charges asked, asserted clear legal propositions.—Best on Presumptions, (47 L. L.) 168, § 210; State v. Murphy, 6 Ala. 852; Mickle v. The State, 27 Ala. 20; 3 Greenl. Ev. § 29.

GEO. W. GAYLE, with M. A. BALDWIN, Attorney-General, *contra*.—1. The constitution of Alabama secures to every accused person “a fair and impartial trial.”—Art. I, § 10. Section 3319 of the Code provides, that slaves shall be tried “in the *mode* provided by law for the trial

of white persons." Section 3608 secures to "any person," indicted on a criminal charge, the right to a change of venue. When a slave is charged with a crime, he loses the character of a chattel, and is viewed as a *person*.—Federalist, No. 54. A slave cannot be twice put in jeopardy, because he is a *person*.—*Ex parte Brown*, 2 Bailey, 323. An indictment lies for the murder of a slave, as a *person*, at common law.—2 Hawk. 454; *State v. Flanagan*, 5 Ala. 477; *State v. Jones*, 5 Ala. 666. A slave, when in jail, is entitled to a list of the jury and a copy of the indictment, as a *person*.—*State v. Brister*, 26 Ala. 107; Code, § 3576. In Louisiana, slaves are embraced in the general law.—12 La. (Ann.) 805. In North Carolina, slaves are held to be embraced in the general law as to protection, but not as to punishment.—Busbee's R. 214. Even if the change of venue was illegal, it cannot work a reversal of the judgment.—*Porter v. The State*, 5 Mo. 538.

2. The interposition of the plea of not guilty by the court, was authorized by the statute, (Code, § 3574;) and, even if unauthorized, could not possibly have prejudiced the prisoner.

3. No authority is cited for the position, that the jury should have been sent out during the preliminary investigation touching the admissibility of the confessions: and the uniform practice, in this State and elsewhere, has been to the contrary.

4. The admissibility of the prisoner's confessions, made and corroborated as they were, is fully sustained by the following authorities: *Brister's case*, 26 Ala. 107; *State v. Long*, 1 Hayw. 455; *State v. Potter*, 18 Conn. 166; *Commonwealth v. Dillon*, 4 Dallas, 111; *Rex v. Gibbons*, 11 E. C. L. 327; 1 Greenl. Ev. §§ 219, 229, 231; Wharton's Criminal Law, 317–18–19–20.

5. The mode of impeaching the slave Hardy was correct, if not the only proper mode. The whole spirit of our legislation confines the character of a slave to his owner and fellow servants, and, as a general rule, he can have no general character outside of his home.

6. It is not necessary to a conviction, that every other

hypothesis should be excluded to a "moral certainty,"—which implies more than a reasonable doubt.—Mickle v. The State, 27 Ala. 20; 1 Starkie's Ev. (m. pp.) 414–15, 514.

A. J. WALKER, C. J.—The prisoner was arraigned, and pleaded "not guilty," at the term of the court at which he was indicted. Upon his last trial, he stood mute; and the court caused the plea of not guilty to be entered, against the objection of his counsel. In this there was no reversible error. It is not conceivable that the prisoner could have sustained the slightest detriment from the course adopted by the court.

[2.] We cannot sustain the position, that the statute does not authorize a change of venue in the case of a slave prosecuted by an indictment. The statute provides, that "the trial of any person, charged with an indictable offense, may be removed to another county, on the application of the defendant, duly supported by affidavit." A slave is a person, in the eye of the criminal law, and, when indicted, is clearly within the language of the statute. There was, therefore, no error in the refusal of the first charge.

[3.] The law undoubtedly requires, that a confession should be shown, *prima facie*, to have been voluntary, before it is admitted in evidence to the jury.—Brister v. The State, 26 Ala. 128; Wyatt v. State, 25 Ala. 12; 1 Phil. on Ev. (edition of 1859,) 542; 1 Greenl. on Ev. § 219; Regina v. Warringham, 2 Leading Criminal Cases, 167; 2 East's Cr. Law, 567. This is usually shown by negative answers to the questions, "whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess; or whether language to that effect had been addressed to him."—Wyatt v. State, *supra*. Before the court decided to admit the confession made to Jennings, the witness stated, that he visited the prisoner at his instance; that he addressed to the prisoner the question, "what do you want with me?"—that the prisoner replied, "I have known you a long time; we are members of the same church. You examined me very

closely on the other trial. I then told you a lie; I now want to talk to you as a church member;" and that he (the witness) knew of no promises or threats made to the prisoner. Upon this preliminary proof, the court correctly ruled, that the State might proceed with proof of the disclosure made to the witness. There was a substantial, though not a literal compliance with the rule, as to the proper inquiry preliminary to the admission of the confession. It appeared, *prima facie*, that the confession was voluntary.

[4.] After the court ruled that the confession was, upon the evidence adduced for the prosecution, admissible, the prisoner produced witnesses, with a view of showing that the confessions made to the witness Jennings, and also to Carson, were not voluntary. After hearing the evidence, which is set out in the bill of exceptions, the court admitted the confessions made separately to the two witnesses. We are now to inquire whether the court erred in its ruling. The master of the prisoner, some weeks before the confession, made a promise of favor and protection, if the prisoner would disclose to him. The slave made no disclosure, but protested his innocence. Subsequently, the master, on hearing of a disclosure made by another slave, told the prisoner, that he believed him guilty; that he wished him to be hung; that he would give two hundred dollars to have him hung; and that the prisoner need not expect any further assistance or protection from him. On the next day, the confessions were made separately to the witnesses Carson and Jennings. The question arises, whether or not these confessions were induced by the master's promises of favor, made some time before.

It is a rule of great strictness, that if a confession has once been obtained by undue means, no subsequent confessions of like character are evidence, unless it is shown that the influence has been removed.—*Bob v. The State*, 32 Ala. 560. This rule would be applicable, and might have a controlling influence, if the slave had yielded to his master's inducement, and made a confession to the master. The question is, however, not whether an in-

ducement, which produced a confession upon the occasion of its offer, is the parent of a second confession; but, whether an inducement, which had no effect at the time when it was made, was the cause of a confession made some weeks afterwards. The promise of the master was put upon the condition of a disclosure to *him*. The favor promised was, that the master would run the slave out of the country, and sell him. The master's ability to fulfill that promise depended, in a great measure, if not entirely, upon the confessions being made privately to the master, before the law had taken him into its custody. It may, therefore, well be doubted, whether the master's promise could have been understood to extend to a future confession, made to some other person. The slave, however, resisted the inducement, when offered by his master, who had authority over him, to whom he was accustomed to look for protection, and who had, in all probability, the ability at the time to execute the promise. Is it probable, that the inducement, which was ineffectual when offered under such circumstances, acquired several weeks afterwards such an influence, as to superinduce a confession to a person other than the master, when the prisoner had been taken into custody, and the master's ability to comply with the promise was greatly lessened, if not altogether destroyed? We do not pause to answer this question; for, if we could conceive it possible that a slight influence produced by the master's promise lingered in the slave's mind, and was liable to produce a confession, we should be bound to regard that influence as totally removed by the forcible admonition of the master, that he need not expect any further assistance or protection from him; that he believed him guilty, and desired him to be hung. Looking at the subject in every aspect, we think the court below was entirely safe in assuming, that no influence exerted by the promise of the prisoner's master caused the confessions which were made.—Moore's case, 2 Leigh, 701; State v. Guild, 5 Hals. 163. The principle is, that although a threat or promise may have been made use of, the confession is to be received, if it has been made under such circumstances as to create a reasonable

presumption that the threat or promise had no influence, or had ceased to have influence upon the mind of the party.—Roscoe's Crim. Ev. 42; 1 Greenl. on Ev. § 221; *Brister v. State*, 26 Ala. 129.

To the argument that the confessions were promised in order to procure an opportunity to sleep, and afterwards made in fulfillment of that promise, we cannot assent. The testimony very clearly shows that the prisoner sent for the witness Carson; that he asked an opportunity to sleep, in order that he might compose his mind; and that he voluntarily requested the witness to return in an hour, in order that he might talk with him. The opportunity of sleeping was not afforded upon condition that he would confess, but was asked because, in the perturbed and distressed state of his mind, the prisoner needed the composure which sleep would bring to fit him for the interview which he desired.

There was nothing said by either of the witnesses, Carson or Jennings, calculated to produce upon the prisoner's mind the belief that it would either be worse for him to withhold his confession, or better for him to make it. His confessions seem to have been prompted by a sense of religious duty, awakened by the apprehension of a speedy execution at the hands of lawless violence, and were not the result of the slightest hope of temporal benefit on account of the confessions. We decide, therefore, that the court below committed no error in admitting in evidence the confessions made to the witnesses Carson and Jennings.

[5.] Before the court went into the preliminary examination for the purpose of ascertaining whether the confessions were voluntary, the prisoner's counsel moved the court to cause the jury to withdraw pending the examination, lest they might be so affected by the evidence detailed on the preliminary examination, that the impression could not be removed if the evidence was excluded. The court refused to cause the jury to retire, and the prisoner excepted. As the confessions were admissible, the prisoner could have sustained no injury from the fact that the jury was present during the preliminary investi-

gation ; and we could not reverse, even though the court had erred in that respect. We deem it proper, however, to say, that the court committed no error in refusing to cause the jury to retire, as was requested. There is no rule of law, which requires that inquiries as to the admissibility of evidence should be conducted apart from the jury ; and we can perceive no adequate reason why we should inaugurate such a rule. We can not presume that jurors are incompetent to banish from their minds the effect of those things which may happen to be heard by them in such examinations, and which are not admitted as evidence for their consideration. We do not act upon that presumption. It is settled that no reversible error is committed by the admission of illegal evidence, if it be afterwards withdrawn.—*Frierson v. Frierson*, 21 Ala. 549 ; *Bilberry v. Mobley*, *ib.* 277. The propriety of conducting such examinations apart from the jury, must be left to the discretion of the presiding judge. There may occur cases where such a course would be necessary, in order to accomplish the ends of justice. When such a case occurs, an appeal must be made to the enlightened discretion of the circuit judge.

[6.] The evidence of the witness Quarles was admissible. It was pertinent to the question of the correctness of the declarations of the deceased, and of the confessions of the accused ; and for that reason, if for no other, it was competent testimony in the cause.

[7.] The witness Wiley stated, that he knew the character of the witness Hardy in the family to which he belonged, and that the family consisted of eight or ten whites, and about fifty blacks ; but he stated, that he did not know his character in the community. The court permitted the character in such family to be given in evidence, and that ruling is assigned for error. It is true that the repute in the neighborhood is usually laid down in the law-books as the test of the general character which may be given in evidence ; but the inquiry is not to be confined to the repute among those who, on account of propinquity of residence, are neighbors in the common acceptation of the term. The term *neighborhood* is said,

in a Pennsylvania case, to be co-extensive with the intercourse of the witness.—*Chess v. Chess*, 1 Penn. R. 40. This court, in discussing the qualification of a witness to testify as to character, decided, that he must be able to state what is the general repute of the person with those among whom he dwells, or with whom he is chiefly conversant.—*Sorrelle v. Craig*, 9 Ala. 534; *Hadjo v. Gooden*, 13 Ala. 718. Again, this court said, that the question should be, whether the witness knows the general character among his neighbors, or *those acquainted with him*. *Dave v. State*, 22 Ala. 23. Eight or ten whites and fifty slaves, congregated together, form quite a community. A wholesome discipline requires that the slaves should be kept chiefly at home; and the intercourse of the slave outside such community is, in many cases, rare, and for a very short time. It may frequently happen, therefore, that the slave has no character outside of the community to which he specially belongs. His character in a family or community, such as that above mentioned, is not a reputation with a few persons: it is a general character, and often the only character which the slave has. We think a slave's general character in such a community is admissible in evidence. Such a character will frequently be as extensive as the slave's intercourse, and will be his reputation with those who are chiefly conversant with him. There was no error in admitting the evidence of the witness Wiley.

[8.] The evidence of Buster, as to character, ought to have been excluded. He showed by his answer on cross-examination, that his estimate of Hardy's character was not based upon his general repute among his neighbors, or those acquainted with him.—*Dave v. State*, 22 Ala. 38; *Hadjo v. Gooden*, 13 Ala. 718; *Wike v. Lightner*, 11 S. & R. 199-200.

[9.] The court below erred in refusing to give the third and fourth charges asked, which are substantially the same.—*Best on Presumptions*, 282, § 210; *Starkie on Ev.* (edition of 1860,) 759, marg. 862; *Mickle v. State*, 27 Ala. 20; *State v. Murphy*, 6 Ala. 845; *Harrington v. State*, at the present term; *State v. Newman*, 7 Ala.

69; State v. Marler, 2 Ala. 43. By moral certainty, we understand to have been meant, that kind of certainty which is distinguished from physical or mathematical certainty—which controls and decides the conduct of men in the highest and most important affairs, where the guidance of the senses or of mathematical calculations cannot be had. We think, too, that the context of the third charge requested shows that the word *supposition* in that charge was not used in the sense of imagination, or to designate an operation of the mind, but points to something supposed; and that the word *supposition*, in the third charge, is not distinguishable from the word *hypothesis* in the fourth charge, in the office which it performs. Thus understood, the third charge is, in substance, the same with the fourth; and they both assert nothing more than the proposition, that the jury must from the evidence be convinced to a moral certainty of the defendant's guilt, in order that they may return a verdict against the accused. Unless the jury are *morally* certain of the defendant's guilt, it cannot be said that they have no reasonable doubt of his guilt. The proposition, therefore, that the jury must be convinced to a moral certainty of the defendant's guilt, is substantially the same with the proposition, that they must be so convinced beyond a reasonable doubt.

[10.] The fifth charge requested, was properly refused. The jury ought not to be instructed, that they must acquit, if there is any other "possible hypothesis" than that of the defendant's guilt. A doubt which requires an acquittal, must be "actual and substantial, not mere possibility, or speculation." It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jury in that condition, that they cannot say they feel an abiding conviction to a moral certainty of the charge.—Webster's case, 5 Cush. 320.

[11.] The *corpus delicti* being otherwise established, a

conviction may be had upon confessions alone, if they were free and voluntary, and satisfactorily proved.—Wharton's Am. Crim. Law, § 683.

The judgment of the court below is reversed, and the cause remanded; and the prisoner must remain in custody, until discharged by due course of law.

PARIS vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Arraignment, and service of copy of indictment and venire: presumption in favor of judgment.*—When the record in a criminal case shows that the prisoner, being brought to the bar in custody, pleaded not guilty, without raising any objection to the preliminary proceedings, and was thereupon tried and convicted, the appellate court will not reverse the judgment of conviction, because the record does not affirmatively show that he was formally arraigned, and served with a copy of the indictment and a list of the jury.
2. *Change of venue.*—The venue having been changed on the prisoner's application, and the cause afterwards re-transferred, by consent, back to the county in which the indictment was found, and the trial there had without objection on the part of the prisoner, he cannot be heard, in the appellate court, to question the validity of the order re-transferring the cause.

FROM the Circuit Court of Marshall.

Tried before the Hon. S. D. HALE.

THE prisoner in this case was indicted, by the name of Abner Paris, at the March term, 1858, of the circuit court of Marshall, for the murder of James Rose. On his application, at the September term, 1858, the trial was removed to Jackson county, and the cause was there continued at two successive terms. At the March term, 1859, "on the application of the defendant, with the consent of the State," as the minute entry recites, the cause was

removed back to Marshall county, where a trial was had, at the March term, 1860, which resulted in a judgment of conviction. The minute entries of the trial term, as set out in the record, are in the following words:

“The State } This day came the State of Alabama, by
vs. } William J. Haralson, solicitor, and Abner
Abner Paris. } Paris, the defendant, in his own proper
person, in open court; and the State of Alabama and said
defendant in open court declaring themselves ready for
trial on this indictment, and agreeing that the said trial
shall be set for Wednesday of the second week,—it is
therefore ordered by the court, by and with the consent
of the said defendant, that Wednesday of the second week
of the present term of this court be, and the same is
hereby, set for the trial of this cause; and it is further
ordered, that the sheriff of Marshall county forthwith
summon one hundred jurors, including in said number
the jurors summoned on the regular panel for the second
week of this term, and that said sheriff serve upon said
defendant a full and complete list of the jurors so sum-
moned, two entire days before the said day fixed for the
trial as aforesaid; and it is further ordered by the court,
that a copy of the indictment in this cause be served by
the said sheriff, in person, on the said defendant, in prison
in the county jail.”

“The State } Wednesday, March 14, 1860. This day
vs. } comes the solicitor, W. J. Haralson, who
Abner Paris. } prosecutes for the State in this behalf; and
the defendant, being brought to the bar in custody, pleads
not guilty, and for his trial puts himself upon the country;
and the State doth the like. And thereupon came a
jury,” etc., “who,” etc., “upon their oaths say, ‘We, the
jury, find the defendant guilty of murder in the first de-
gree, and that he must suffer death,’” etc.

There is a bill of exceptions in the record, in the follow-
ing words: “In this cause, the defendant moves the court
for an arrest of judgment, on the following grounds:
1. That the prisoner was not arraigned; the indictment
was not read to him, nor to the jury; nor was he required
to plead to the indictment; nor did the court cause the

plea of not guilty to be entered. 2. That in the indictment upon which the jury found their verdict, the name of the defendant is not described: that the name of the person charged in said indictment is Abner *Paris*, while the name of the prisoner is Abner *Parish*. Which motion being refused by the court, the defendant excepts," etc.

B. T. POPE, for the prisoner.—1. The record does not show that the prisoner was ever arraigned; nor that he was served with a copy of the indictment, or with a list of the jury, although it appears he was in actual custody; nor that he had knowledge of the indictment on which he was charged. It only shows that he was in actual custody, that the court ordered a copy of the indictment and a list of the jury to be served on him, and that he pleaded not guilty when brought to the bar for trial; but to what charge this plea was interposed does not appear. All these important rights are secured to an accused person by constitutional and statutory provisions, and he has a right to demand a strict compliance with the requisitions of the law. The mere silence of the record, on such essential points, does not authorize the presumption that all the requisitions of the law were complied with. If any presumption at all is to be indulged, it must be *in favorem vita*.—*Henry v. The State*, 33 Ala. 397; *Hughes v. The State*, 1 Ala. 655; *Fernandez v. The State*, 7 Ala. 511; *Bill v. The State*, 29 Ala. 39; *Parsons v. The State*, 22 Ala. 50; 6 Barr, 384; *Sailer v. The State*, 1 Harr. 357; 9 Leigh, 623; 1 Archb. Cr. Pl. 351, note: 1 Chitty's Cr. L. 414; 4 Bla. Com. 375; 1 Burr. 643.

2. It was error to change the venue back to Marshall county. The statute is imperative, that "the trial can be removed but once."—Code, § 3610. Consent cannot give jurisdiction.

M. A. BALDWIN, Attorney-General, *contra*.—1. Conceding that there was no formal arraignment of the prisoner, and that no copy of the indictment or list of the jury was served upon him,—a concession not authorized by the mere failure of the record affirmatively to show

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the contrary; nevertheless, the plea of not guilty was a waiver of these preliminary proceedings.—*State v. Williams*, 3 Stew. 463; *State v. Matthews*, 9 Porter, 370; *State v. Greenwood*, 5 Porter, 474; *Bramlett v. The State*, 31 Ala. 382; *Fernandez v. The State*, 7 Ala. 512; *United States v. Gilbert*, 2 Sumner, 20; *McQuillan v. The State*, 8 Sm. & Mar. 589; *Powell v. United States*, 1 Morris, (Iowa,) 17; 3 Wisconsin, 820; 2 Hale's P. C. 219, note 3; 2 Hawk. ch. 28, § 6; 1 Chitty's Criminal Law, 419.

2. That the venue may be changed by consent, see *Rosenbaum v. The State*, 33 Ala. 354; *Hughes v. The State*, at the last term; *Gager v. Gordon*, 29 Ala. 344; 1 Bishop's Crim. Law, §§ 657, 672.

STONE, J.—We have carefully considered the record, and the points pressed on our consideration, in this case, and have not been able to find any error which, under our decisions, justifies a reversal. The silence of the record in the matter of the service of a copy of the indictment, and a list of the jurors, two entire days before the trial, and in the matter of a formal arraignment before plea pleaded, raises questions, all of which are of kindred character. Although these are among the clear legal rights of one who stands charged with a capital felony, still, they are not of that high grade—do not so enter into the very essence of the trial by jury—that the record must, in all cases, show affirmatively that they have been observed. When, as in this case, the record affirms that the prisoner, being brought to the bar, pleads not guilty, and thereupon a jury is impaneled, and the trial progresses in usual form to a verdict of guilty, and sentence of the law pronounced thereon; when, notwithstanding these compliances with the most essential parts of a jury trial, no objection or exception appears to have been made in the court below, questioning the regularity of any preliminary step in the prosecution,—we but conform to our former decisions, in presuming that all has been regularly done, which does not appear by the record to have been otherwise.—*Williams v. The State*, 3 Stew. 454, 463; *Greenwood's case*, 5 Por. 474; *Matthews' case*,

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9 Por. 374-5; Hughes v. The State, 1 Ala. 656; Fernandez v. The State, 7 Ala. 512; Bramlett v. The State, 31 Ala. 382; Rosenbaum v. The State, 33 Ala. 354; U. S. v. Gibert, 2 Sumner, 69, *et seq.*; Douglas v. State, 3 Wis. 820; Hughes v. The State, 35 Ala. 351.

[2.] Of the fact that the trial was had in Marshall, instead of Jackson county, the plaintiff in error cannot be heard to complain. The venue was re-transferred to Marshall at the instance of the prisoner, and the trial was then and there had, without any objection on his part. Moreover, the trial took place in the county in which the indictment was found, and in which the offense was committed. Without announcing any opinion on the question, whether a party accused of a felony can, by his consent, transfer the trial, after the venue has been once changed, to any county other than the one in which the offense was committed, we feel no hesitation in asserting, that the right to have his trial adjourned to a county free from prejudice against the accused, is a *privilege* secured to the prisoner, which he may waive, either before or after the order changing the venue has been entered. Hughes v. The State, 35 Ala. 351; Rosenbaum v. The State, *supra*; 1 Bish. Cr. Law, §§657, 672; Gager v. Gordon, 29 Ala. 344.

The judgment of the circuit court is affirmed, and the sentence of the law must be executed.

HARRINGTON vs. THE STATE.

[INDICTMENT FOR FURNISHING LIQUOR TO SLAVE.]

1. *Authority of city court of Mobile at special terms.*—Under the act of 1858, "to repeal an act therein named regulating the sessions of the circuit and city courts of Mobile," (Session Acts 1857-8, p. 57, §3,) the city court has authority, at a special term, to originate business, to take indictments, and to organize a grand jury.

2. *Objections to grand jury.*—If an indictment is void, because found at a special term, at which the court had no authority to organize a grand jury, the objection may be taken for the first time in the appellate court; but, where the court had such authority, the prisoner cannot (Code, § 3591) take any objection to the indictment on account of the want of qualifications of any of the grand jurors.
3. *Presumption in favor of judgment.*—If the validity of an indictment, found at a special term of the city court of Mobile, depended upon the fact that the accused was in custody at the time it was found, and the record did not affirmatively show that he was not then in custody, the appellate court would presume, in favor of the judgment, that he was then in custody.
4. *Sufficiency of indictment.*—It is not necessary that an indictment should show where the session of the court or of the grand jury was held, or that the grand jury was legally called before the court, or that the indictment was returned into court, or that the offense was committed within the period prescribed as a bar by the statute of limitations.
5. *Allegation of ownership of slave in indictment.*—Since the husband has a special property in his wife's statutory separate estate, (Code, § 1983,) a slave belonging to her separate estate may be described in an indictment as the property of the husband.
6. *Conviction on testimony of accomplice.*—If a master gives money to his slave, and sends him into a grocery to buy liquor, while he himself waits without to see whether the liquor is furnished to the slave, he cannot be considered an accomplice of the seller, within the meaning of the statute (Code, § 3600) which forbids a conviction on the uncorroborated testimony of an accomplice.
7. *Selling liquor to slave.*—Under an indictment for selling liquor to a slave, (Code, § 3283,) the fact that the slave's master gave him money, and sent him into the defendant's house to buy liquor, while he himself waited on the opposite side of the street, for the purpose of ascertaining whether the defendant would unlawfully sell liquor to slaves, constitutes no defense.
8. *Charge on sufficiency of circumstantial evidence.*—A charge to the jury, instructing them that they could not lawfully convict the prisoner, "if, upon all the evidence, they believed that the probabilities of his guilt were as high as ten thousand to one against his innocence, and but one chance in favor of his innocence,"—held to have been properly refused, because the record did not show that the evidence was confined to facts wholly inconclusive in their tendency; and the court added, "It may be doubted, indeed, whether the charge, in the form in which it was asked, would not, in any case, be more calculated to confuse, than to enlighten the jury."

FROM the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE indictment in this case was found at the "special May term, 1860," of said city court; and charged, that the prisoner, Catharine Harrington, before the finding of said indictment, "did sell, give, or deliver, to a slave named Robert, belonging to Thomas A. Lyon, vinous or spirituous liquors, without an order in writing, signed by the overseer or master of such slave, specifying the quantity to be sold, given, or delivered." The prisoner interposed a demurrer to the indictment, on the following specified grounds: "1st, that the indictment does not show that any grand jury was legally called before the court at said term; 2d, that it does not appear by said indictment where the session of the court or grand jury was held; 3d, that it does not appear by said indictment that it was returned into court by said supposed grand jury; 4th, that it does not appear by the indictment that said supposed grand jurors were qualified as the law requires, nor that the court examined them as to their qualifications; 5th, that it does not appear by the sheriff's return that said supposed grand jurors were qualified; 6th, that one Turner appears to have been one of said supposed grand jurors, and his christian name is not set out in the indictment, as required by section 3441 of the Code; and, 7th, that said indictment does not state any time when said offense was committed, or show that said offense was committed within one year before the finding of said indictment." The court having overruled the demurrer, the prisoner then filed several pleas in abatement, alleging that certain grand jurors, whose names were specified, were neither freeholders nor householders in the county; and a demurrer having been sustained to each of these pleas, she then went to trial on the plea of not guilty.

"On the trial of the cause," as the bill of exceptions states, "the evidence as to the ownership of the slave Robert, who was described as belonging to Thomas A. Lyon, was, that at the marriage of said Lyon, on the 23d February, 1859, said slave belonged to his wife; that since said marriage said slave had been hired out to a railroad company; but that said Lyon exercised entire control and

direction over said slave during the whole of said time. Upon this evidence, the defendant asked the court to charge the jury, that if they believed from the evidence that the slave belonged to Mrs. Lyon, a married woman, as her separate estate, then they could not convict the defendant. The court gave this charge, but with the following qualification: 'If, however, the jury believe that said slave was owned by said Lyon's wife at the time of their marriage, and that there was no trustee in whom the legal title was vested, then the husband became the trustee of his wife, and the legal title was in him;' to which qualification the defendant excepted. The defendant also requested the court to instruct the jury as follows: 'If they find that said slave belonged to the separate estate of said Lyon's wife, the legal title to said slave was not in said Lyon, unless it was proved that his wife held said slave under the woman's law of this State.' This charge the court also gave, but with the following qualification: 'If there was no evidence of a trustee for Mrs. Lyon, her husband would be recognized as her trustee, and if he had the custody and control of the slave at the time, it is sufficient.'

"The evidence was, that Thomas A. Lyon supplied the slave with a bottle, and with money, and told him to go and see if he could get liquor from the defendant, and, if so, to get it; and then went with said slave to the street on which the defendant's house was situated, and stopped on the opposite side from the house, and stood behind a post, and watched said slave go into the house; also, that this was in the night-time, and said slave had no liquor when he went into said grocery; that the defendant opened the door, and let in said slave, who then went in, and came out in a short time; that said Lyon watched him all the time; that the slave walked on down the street twenty or thirty steps, (said Lyon walking down on the opposite side of the street,) and then crossed over to said Lyon, and held his two hands together, forming a kind of cup, and let whiskey run out of his mouth into his hands; and that said slave, some ten minutes previously, had gone into another grocery, and brought out

liquor in his mouth, and poured it out in his hands in the same way. On this evidence, the defendant asked the court to charge the jury, that Lyon was an accomplice of the defendant, and that they should not convict the defendant upon his testimony, if it was not corroborated; also, that if Lyon was the owner of the slave, and was present at the time, or near enough to have the slave under his control when the liquor was delivered to the slave, and consented to, or procured the delivery of the liquor to the slave, then the defendant was not guilty. The court refused each of these charges, and the defendant excepted.

“ The defendant also requested the following charges :
1. ‘ Before the jury can legally convict in any criminal case, the evidence against the accused must be so conclusive upon their minds as to convince them that he cannot be innocent.’ 2. ‘ If the jury have a reasonable doubt as to the *conclusions* of the proof or any single fact which it is necessary for the State to prove, they must acquit the defendant.’ 3. ‘ A reasonable doubt is a doubt which naturally arises in the mind in considering the evidence.’ 4. ‘ The whole case, and all the facts, must be conclusively proved by the State.’ 5. ‘ The proof of suspicious facts against the accused does not even require him to rebut it, and they cannot convict upon suspicious facts merely.’ 6. ‘ If, upon all the evidence, the jury believe that the probabilities of the guilt of the accused are as high as ten thousand to one against his innocence, and but one chance in favor of his innocence, they cannot legally convict.’ The court gave all these charges, except the last; and to the refusal of the last the defendant excepted.”

BEN. LANE POSEY, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—1. By the act of February 5th, 1858, it is provided, that “special terms of the city court may be held, by order of the judge, whenever it may be necessary for the trial of criminal causes, *and to deliver the jail of all persons charged with crimes and offenses.*”—Acts

of 1857-'58, p. 57, § 3. Under this act, the authority of the court, at the special terms here provided for, is certainly as extensive as that with which the English judges were clothed by virtue of the commission of *general jail delivery*. This commission was held to confer upon the justices to whom it was directed the power to originate business, as well as to try those cases originated by other justices. Accordingly, they had the right to take indictments against all persons in actual or constructive custody.—1 Chitty's Cr. Law, 145-6; 2 Hale's P. C. 34-5; 2 Hawk. ch. 6, § 2; 4 Wendell's Blackst. 270, note 17.

The power to originate business, and to take indictments, involves the power to organize a grand jury. As to what is the proper mode of obtaining a grand jury at a special term of the city court of Mobile, we need not now inquire. We go as far as it is at all necessary in this case, when we decide, that the city court of Mobile has the power to organize a grand jury at a special term, held under the act of 1858.

[2.] If the court had no authority to organize a grand jury at the special term, an indictment found at that term might possibly be void; and, in that case, the objection could be taken for the first time in this court. If, on the other hand, the court had such authority, the objections which the defendant interposed to the manner in which the particular grand jury was organized, can be of no avail; for the Code expressly provides, that none of the objections which the defendant made to the indictment, on grounds relating to the formation of the grand jury, shall be allowed, whether taken by plea of abatement, or otherwise.—Code, § 3591. And the same section of the Code furnishes a complete answer to the assignments of error which ask a reversal of the judgment, because, as it is alleged, the record does not show that the grand jurors possessed the qualifications required by law, or that they were examined in reference to their qualifications, or that they were sworn in the manner directed by the Code. *Floyd v. State*, 30 Ala. 511.

[3.] If it be conceded, that the city court, when holding a special term, is subject to the same restrictions by which

commissioners of *general jail delivery* under the English law were bound; and that, accordingly, no indictment can be found by a grand jury, at a special term, against persons not in actual or constructive custody, the concession would not avail the plaintiff in error. The city court is a court of general jurisdiction; and if an indictment found at a special term, against a person not in custody, would be invalid, we would presume, unless the contrary was shown by the record, that the defendants in indictments found at such term were at the time in custody. It is proper to say, that we intimate no opinion as to whether the authority of the court at a special term is subject to the limitation suggested.

[4.] It is not necessary for the *indictment* to show that the grand jury was legally called before the court, or where the session of the court or grand jury was held, or that the indictment was returned into court. For this reason, if for no other, there was no error in overruling the demurrers assigning these as grounds of objection to the indictment. All the other grounds of demurrer, except the 7th, consist of matters relating to the formation of the jury, and were properly overruled.—Code, § 3591. There is nothing in the objection assigned as the seventh ground of demurrer, the indictment being in the form prescribed by the Code.

[5.] Under the Code, (§ 1983,) the husband has a special property in the separate estate of his wife. Hence, the slave was in this case properly described as the property of Mr. Lyon.

[6.] Lyon was certainly not an accomplice of the defendant in the act of selling. There was no community of purpose between them; the defendant not even being aware of Lyon's presence, nor in any degree influenced by it. The statutory offense consists in the act of selling, not in that of buying; and neither the purchaser, nor one participating in the purchase, can be deemed an accomplice of the seller.—See *Davidson v. State*, 33 Ala. 353.

[7.] If it be the law, (which, however, we do not affirm,) that an indictment under section 3283 of the Code, for

selling liquor to a slave, could not be sustained, where the sale was made, and the liquor delivered, in the presence of the master, and by his consent; it is obvious that this can only be true, in those cases where the fact of the master's presence was known, and his assent communicated to the seller. An uncommunicated consent can exert no influence upon the conduct of the seller, and is no defense to an indictment for the act of selling. Moreover, the consent, to be an available defense, must be a consent to a sale of the liquor, not merely to an experiment to detect a violation of the law. The master's delivery of money to a slave, with instructions to buy liquor from a person whom he suspects of having unlawfully sold liquor to slaves, for the purpose of detecting the offender, does not excuse the sale of liquor to the slave for such money. *Jolly v. State*, 8 S. & M. 145; *State v. Anone*, 2 N. & McC. 27.

[8.] Mr. Starkie, speaking of circumstantial evidence, says: "Whenever the probability is of a definite and limited nature, (whether in the proportion of one hundred to one, or of one thousand to one, or any other ratio, is immaterial,) it cannot be safely made the ground of conviction."—1 Starkie's Ev. 574. But this principle is applicable alone to facts entirely inconclusive in their tendency—that is, to such facts or circumstances that, when all they tend to prove is admitted, the guilt of the accused is still left wholly uncertain, or dependent upon some definite probability. As the record does not show that the evidence was confined to facts wholly inconclusive in their tendency, the court did not err in refusing the last charge asked by the defendant.—*Mickle v. State*, 27 Ala. 21.

It may be doubted, indeed, whether the charge, in the form in which it was asked, would not, in any case, be more calculated to confuse than to enlighten a jury. A charge was asked, on a trial in Mississippi, almost in the identical words of the one under consideration. The appellate court held, that there was no error in the refusal to give the charge, and used the following language in regard to it: "It is true that this charge is a

literal transcript of language used by a learned writer in expounding the doctrine of circumstantial evidence. It is manifest that the proposition contained in the charge was not announced by the author from whom it was copied, as a distinct principle of law. It was intended as an illustration of the weight which should be given to circumstantial evidence, in determining the question in any given case, whether such evidence was sufficient to exclude from the mind of the judge or jury all doubt of the guilt of the party sought to be affected by it. The instruction presents an extremely abstract proposition; and was much more likely to confuse the jury, than to enlighten them upon the questions under consideration."—*Browning v. State*, 30 Miss. R. 656, 673; *Browning v. State*, 33 Miss. R. 47.

We find no error in the record of which the defendant can here complain.

Judgment affirmed.

PRIM vs. THE STATE.

[INDICTMENT FOR OBSTRUCTING PUBLIC ROAD.]

1. *What constitutes obstruction of public road.*—To obstruct a public road by a fence, bar, or other impediment of like kind or description, placed in or upon the road, is made a misdemeanor by statute, (Code, § 1176;) but where the obstruction is caused by a mill-dam, erected at some distance from the road, whereby the water is backed up and increased at the point where the stream crosses the road, to such a depth as to impede and interfere with travel, this is no violation of the statute, unless *willfully* done.

FROM the Circuit Court of Dale.

Tried before the Hon. S. D. HALE.

THE indictment in this case charged, that the defendant "did obstruct a certain public road in said county, to wit,

the road leading from Newton to Abbeville, on that part of said road, about five miles from Newton, where said road is crossed by a creek known as 'Prim's mill creek,' by a certain impediment, to wit, by damming up said creek where it crosses said public road, so as to cause the water from said creek to overflow said road, in such manner as thereby to obstruct travel on said road, and to endanger the safety of divers persons then and there traveling and passing on said road." The defendant demurred to the indictment, but on what ground the record does not show; and, his demurrer being overruled, pleaded not guilty.

"The State proved on the trial, that within twelve months before the finding of the indictment, the road therein specified was overflowed, at a point about five miles from Newton, in said county, by waters from the defendant's mill creek; that the water was sometimes so deep in the road, in consequence of said overflow, that it ran into buggies passing on said road; that on one occasion it was so deep in said road, that oxen, drawing a wagon, were forced to swim to reach the other side; that said overflow had frequently taken place before the defendant became the owner of said mill, and while it was controlled by others; that since the defendant had owned said mill, said water had increased two feet or more in depth; that the defendant had erected a bridge, at his own expense, for the convenience of the public, over the point in said road overflowed by said water, and kept the same up, although it was out of repair and unsafe for crossing for six months of the year prior to the finding of the indictment. It was further proved, that said creek was not, and never had been dammed up by a dam built at the point where it crossed said road; that the overflow was caused by a dam, owned by the defendant, at a point distant about a half-mile from said road, where defendant lived, and where his mill and dam were; that there was no other impediment of any sort placed on said road by defendant, or by any one else; that the water in said road was not more than one foot deep before said dam was erected, but was from three to four feet deep after said

dam was erected, and was backed up in said road by said dam.

"This being all the evidence in the case, the defendant asked the court to instruct the jury, that if they believed from the evidence that the overflow of the waters of the creek was not caused by the defendant's damming up said creek where it crossed said road, but by damming it up at a different point not on said road, then they cannot find the defendant guilty. The court refused this charge, and instructed the jury, that if they believed from the evidence that said road was overflowed by water, backed up over said road from the defendant's mill-dam, situated a half-mile from said road, and that said road was obstructed by said waters, so that persons traveling on said road could not pass with convenience, then they must find the defendant guilty; to which charge, as well as to the refusal of the charge asked, the defendant excepted."

PUGH & BULLOCK, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—By section 1176 of the Code, it is made a misdemeanor "to obstruct a public road by a fence, bar, or other impediment," "or willfully to injure or obstruct any public road in any way." A construction must be sought, which will give to each of these two clauses some operation. "Sound exposition requires effect to be given to every significant clause, sentence, or word in a statute."—Spivey v. State, 26 Ala. 90-101; Smith's Com. on Stat. and Con. Law, 632, §488. The willful obstruction of a public road in any way is condemned by the latter clause. The obstruction of a public road by a fence, bar, or other impediment, is condemned in the former. If we understand every mode of obstruction to be included in the phraseology of an obstruction "by a fence, bar, or other impediment," we give the statute the senseless effect of declaring an act criminal because of its willfulness, when it had previously made the perpetration of the act a misdemeanor; and no field of practical operation will be left for the clause in reference to the willful obstruction of a road in any way.

In *Johnson v. State*, (32 Ala. 583,) we intimated, that an obstruction of a public road, by so cutting a ditch as to cause water to flow upon it, was not an offense embraced within the clause which makes it a misdemeanor to obstruct by a fence, bar, or other impediment. The opinion then suggested is correct. By the phrase "other impediment," following after two specified impediments—fence and bar—we must understand to have been meant impediments *ejusdem generis*—impediments of like character with those before specified. The clause must be read, as though it said "fence, bar, or other impediment of the same sort," and confined in its operation to those impediments which are placed, like bars and fences, on or upon the road; and not to those which result consequentially. This construction of that clause leaves the last clause, in reference to the *willful* obstruction of a road, to operate upon all other cases of obstruction, save that class of which fences and bars are examples; and no other construction will allow it any practical effect. We, therefore, adopt it as the correct construction.

The testimony in this case shows, that the obstruction of the road was the result of building and retaining a mill-dam across a creek, some distance below the point at which it intersected the road, whereby the depth of the water in the road was sometimes so increased as to interfere with the travel. The obstruction was consequential; it was not of the same kind with a fence or bar placed directly upon the road. Such an obstruction is embraced in the last clause of the section, and the causing of it is not a misdemeanor, unless it was *willful*.

The rulings of the court below are inconsistent with the conclusion above expressed, and the judgment of the court below must therefore be reversed, and the cause remanded.

HARRISON vs. THE STATE.

[INDICTMENT FOR FORGERY.]

1. *Plea of former acquittal; presumption in favor of judgment.*—Under an indictment charging the uttering and publishing as true of a forged instrument, knowing it to be forged, the defendant pleaded a former acquittal, and proved, “that he was heretofore indicted and tried for the forgery of the same instrument with the uttering of which he is charged in the present indictment, and was regularly acquitted upon such trial,”—*held*, that ‘presuming this to be all the evidence in the case, there was no error in a charge which instructed the jury, “that a trial for, and acquittal of the forgery of an instrument, was not a bar to a subsequent indictment for uttering the same instrument as genuine, knowing it to be forged.”’
2. *Sufficiency of indictment.*—An indictment which charges the felonious uttering and publishing as true of a forged instrument, knowing the same to be forged, is sufficient, (Code, §§ 3154, 3165, 3501, 3518–19, 3526,) although a conviction might also be had for such uttering and publishing under an indictment charging it as forgery.

FROM the Circuit Court of Barbour.

Tried before the Hon. JOHN GILL SHORTER.

THE indictment in this case was in these words :

“The grand jurors for the State of Alabama, chosen and sworn to inquire for the body of Barbour county, upon their oaths present, that William Harrison, *alias* Thomas Craig, and James Wilson, *alias* Richard Schrimshire, in the county aforesaid, on the 20th July, A. D. 1857, feloniously did utter and publish as true, and with intent to defraud, a certain forged instrument, or writing, the forging of which is declared by the laws of said State to be an offense; which said forged instrument or writing is as follows, that is to say—*Mr. Copeland & Co.: Sir—Please let William Harrison have forty-three dollars’ worth, and charge the same to me, this 20th July, 1857, (Signed) James Bigham;*—they, the said William Harrison and James Wilson, at the time they so uttered and published

as true the said forged instrument, then and there well knowing the same to be forged; against the peace," &c.

The defendant Harrison, being on trial alone, reserved the following bill of exceptions: "On the trial of this cause, the defendant pleaded a former acquittal, upon a regular formal trial in this court, upon issue joined between the defendant and the State, upon plea of not guilty pleaded by the defendant, upon a regular indictment charging said defendant with the forgery of the said instrument mentioned in the indictment in this present case, for the uttering of which as genuine, knowing it to be forged, said defendant is charged in the indictment in the present proceeding; and proved, that he was heretofore indicted and tried for the forgery of the same writing with the uttering of which he is charged in the present indictment, and upon such trial was regularly acquitted. The court charged, that a trial for, and acquittal of the forgery of an instrument, was not a bar to a subsequent indictment for uttering the same instrument as genuine, knowing it to be forged; to which charge the defendant excepted. The first indictment contained but one count, and that for forgery only."

S. F. RICE, and JEFF. BUFORD, for the prisoner.

1. Under an indictment for the forgery of an instrument, a conviction may be had on proof of uttering and publishing it as true, knowing it to be forged.—Thompson v. The State, 30 Ala. 28; Bishop v. The State, 30 Ala. 36; Code, § 3165. Consequently, an acquittal, under an indictment charging it as forgery, is a bar to another indictment charging the felonious uttering and publishing as true. As to the plea of former acquittal, see 1 Waterman's Archbold, 360, note; *ib.* 362, note; Henry v. The State, 33 Ala. 400; 26 Penn. 513; 13 Mass. 245; 12 Pick. 496; 17 Pick. 395; 1 Johns. 66; 9 Yerger, 357; 19 Ohio, 423.

2. The indictment should have been for forgery. Knowingly to utter a forged instrument is only evidence of a prior forgery thereof.—Code, § 3165; Bishop v. The State, 30 Ala. 39. The Code furnishes no precedent for an

indictment framed as this was, because the offense charged was covered by another precedent.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—It is a rule in this court, too well settled to be now questioned, that we will indulge every reasonable presumption in favor of the correct ruling of the primary court; and that we will not presume the existence of facts, not shown by the record, with a view to the discovery of grounds on which to base a reversal. The party excepting to the action of the court below, must set out so much of the evidence as is necessary to show that in its rulings that court erred to his prejudice. Shep. Dig. 436, §§ 16, 17, 18, 19; *ib.* 463, § 78.

To bring this case within the principle settled in the cases of Thompson v. The State, (30 Ala. 28,) and Bishop v. The State, (*ib.* 34,) the indictment on which the present defendant was tried must have been preferred in Barbour county, charging the offense of forgery to have been committed in that county. Moreover, the *uttering* and *publishing* as true, *knowing* the order to have been forged, &c., must have taken place before the former indictment was found. Unless both of these facts existed at the time of the former prosecution, it was not possible to have tried and convicted the defendant under the former indictment, for the present offense of uttering and publishing as true.—Waterman's Archbold, 13, 14, and notes; Com. v. Mortimer, 2 Va. Cas. 325; Com. v. Wade, 17 Pick. 400; State v. Ray, 1 Rice, 1; 2 Hale, 245; Hite v. State, 9 Yerg. 357; Burns v. The People, 1 Park. C. C. 183; Com. v. McCloud, 2 Dana, 244; Com. v. Roby, 12 Pick. 496.

The only recital of the evidence in the present record is, "Defendant proved, that he was heretofore indicted and tried for the forgery of the same writing with the uttering of which he is charged in the indictment in this case, and upon such trial he was regularly acquitted." Under the rules above declared, we are not authorized to suppose the existence of other testimony, and on such

supposed testimony to reverse this case. Taking the above recital as the whole of the evidence on the plea of former acquittal, it does not appear that "the facts alleged in this, the second indictment, if proven to be true, would have warranted a conviction on the first indictment."—See *Price v. State*, 19 Ohio, 423; *Hite v. State*, *supra*; *Rex v. Clark*, 1 Brod. & Bing. 473; *Rex v. Emden*, 9 East, 437; *Rex v. Sheen*, 2 Car. & P. 634; *Heikes v. Com.*, 26 Penn. State R. 513; *Com. v. Cunningham*, 13 Mass. 245; *People v. Barrett*, 1 Johns. 65; 2 Lead. Cr. Cases, 553.

If the record in this case affirmed that the former indictment had been preferred by a grand jury of Barbour county, and that the act of uttering and publishing had been done before that indictment was preferred, we can not say that the plea of former acquittal would not have been sustained.—See Code, §§ 3154, 3165; *Thompson v. State*, *supra*; *Bishop v. State*, *supra*; *Waterman's Arch.* 13-14, and notes. The charge, however, in the present case, viewed in connection with the evidence, is free from error.

[2.] Although, under our statutes, a party may be indicted for forging instruments of certain classes, and convicted on evidence which simply shows that he uttered and published them as true, knowing them to be forged, (see Code, §§ 3154, 3165;) yet an indictment framed as this is, is sufficient.—Code, §§ 3501, 3518, 3519, 3526; see, also, 1 *Waterman's Arch.* 13, 14, *supra*.

It results from what we have said, that there is no error in this record, available to defendant, and the judgment of the circuit court is affirmed.

WITHERS vs. THE STATE, EX REL. POSEY.

[APPEAL FROM ORDER OF CIRCUIT COURT GRANTING MANDAMUS.]

1. *When appeal lies.*—An appeal lies to the supreme court, from an order of the circuit court granting a *mandamus* against the mayor of a city.
2. *Averments of petition for mandamus.*—In an application for a *mandamus*, by an attorney-at-law who has been denied the right to appear as counsel in a municipal court, an averment that the relator “is a practitioner of law in all the courts of this State, both of state and federal jurisdiction,” is not a sufficient allegation of his legal right to practice as an attorney in the courts named.
3. *Attorney's right to practice before municipal court.*—Although a quasi-criminal proceeding before the mayor of Mobile, for an alleged violation of a municipal ordinance, is neither a “criminal prosecution,” nor a “civil cause,” within the meaning of the 10th and 29th sections of the 1st article of the constitution, securing to a party the right “to be heard by himself and counsel;” yet, under section 730 of the Code, construed in harmony with the general spirit and policy of these constitutional provisions, an attorney-at-law who has been regularly licensed by the supreme court, and who has taken the prescribed oath, has a legal right to appear, when employed for that purpose, as counsel for persons who are on trial before the mayor for alleged violations of the municipal laws; and, under section 3403, he has also a right to appear as counsel for the accused on a preliminary investigation before the mayor as committing magistrate.
4. *Power of court to remove or silence attorney.*—For any disrespectful or contemptuous behavior in court, tending to impair the respect due to judicial tribunals, or to interrupt the due course of trial, an attorney may be punished at the time for contempt, (Code, §§ 561–3;) and for any willful violation of professional duty he may be removed or suspended from his office, (§§ 747–61;) but, until he has been removed or suspended by the judgment of the circuit court, rendered in a statutory proceeding instituted for that purpose, no court can exclude him from practice at its bar, on account of any disrespectful language or conduct on a past occasion.
5. *When mandamus lies.*—If a court prohibits an attorney, whose license authorizes him to practice before it, and who has not been removed or suspended in the mode prescribed by the statute, from appearing at its bar as counsel in causes in which he has been employed, this is the deprivation of a clear legal right, to the enjoyment of which he will be restored by *mandamus*.

Withers v. The State, ex rel. Posey.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE record in this case shows, that on the 16th April, 1860, Ben Lane Posey made an application to said court for a *mandamus*, to be directed to Jones M. Withers, the mayor of the city of Mobile, commanding him to allow said relator to appear as an attorney and counsellor at the bar of the mayor's court. The petition, verified by affidavit, was in the following words; "Your petitioner, on behalf of himself and C. Russell and Robert Daly, respectfully shows the following facts: 1. That your petitioner is a practitioner of law in all the courts of this State, both of state and federal jurisdiction, and, as such, has paid a license by way of tax to the city of Mobile for the present year. 2. That, as such practitioner of law, he has appeared, whenever employed to do so, in all the courts held in this State; that on the 16th instant, he appeared in the court of the mayor, aldermen and common council of the city of Mobile, holding said court, as counsel for Catherine Russell, who was on trial before said court on a criminal charge, and also upon a civil action, for violating an ordinance of said city; that he claimed the privilege for himself as such counsel, and the right for his client, to cross-examine the witnesses against her, but said Withers stopped him, and refused to let him do so; that your petitioner insisted upon his right and privilege, but was compelled to submit to the illegal and arbitrary decision of the said Withers. Your petitioner further states, that on the morning of the 17th instant, he appeared as counsel for one Robert Daly, who was before said Withers on a criminal charge, and also for violating a city ordinance, but was refused admittance within the bar of said court, by the order (as he was informed) of said Withers; that he waited until the opening of said court, and then stated to said Withers, that he appeared as counsel for a prisoner who was before said court on a criminal charge, and demanded the right, in behalf of said prisoner, to defend his cause; that said Withers

positively refused to allow said prisoner to be defended by your petitioner, and told your petitioner that he should not appear before him as counsel in any case, and ordered the police to refuse admittance to your petitioner within the bar of said court. Your petitioner states, that the said proceedings of said Withers are reckless and high-handed violations of the constitutional rights of the said persons for whom he appeared as counsel, by which they were deprived of the sacred right of defense by counsel of their own choosing, and were deprived of their liberty and property on an *ex-parte* hearing; and were violations also of your petitioner's chartered right to practice in all the courts of this State. Your petitioner is informed and believes, that on the same day when he was denied his privileges as counsel by said Withers, G. Y. Overall and C. P. Robinson were allowed by him to exercise the full privileges of counsel in said court; and your petitioner is thence bound to infer, that said Withers was actuated by malicious and revengeful feelings towards your petitioner, and sought to gratify them by depriving him of the profits of his profession in his practice before said court. Wherefore," etc.

A rule *nisi* having been issued on the filing of this petition, and served on said Withers, he appeared, and filed an answer, in which were incorporated the following exceptions to the petition: "1st, that said Posey has by law no right to appear as an attorney in the court of the mayor, aldermen and common council of the city of Mobile, nor before respondent holding court as mayor; 2d, that no party held to answer before the court has complained of being deprived of the services of said Posey; 3d, that said Posey does not show himself to be entitled to practice law in any of the courts of Alabama; and, 4th, that said Posey shows no cause for a *mandamus*." In reference to what occurred in the mayor's court on the 16th April, the answer contained this statement: "Said Posey came into said court on the 16th April, assuming to act as counsel for one Catherine Russell, who was on trial for furnishing ardent spirits to a negro without authority. Respondent had examined a witness fully, when

said Posey commenced asking the same questions of the witness which respondent had asked, and which the witness had fully answered. Respondent told him that he was propounding questions which had been already propounded and answered; that if there was any new matter to be brought out, or any explanations to be given, he would confine himself to such. To this said Posey answered, that he had a right to examine the witness in his own way. Respondent then told him, he had no right to examine at all. Posey then said, that he would appeal the case; and respondent replied, 'Very well, you can do so when the case is decided.' This is all that occurred on the 16th." The answer further admitted, that on the morning of the 17th April, when Posey claimed to appear as counsel for Daly, he was refused admittance to the bar by order of respondent; alleged that said Posey had published in the newspapers several libelous articles, calculated to bring the respondent and his court into contempt and disrepute, and which were made exhibits to the answer; and contained the following additional statements: "Respondent knows that said Posey pretends to be a lawyer, but he has never produced or shown to respondent any evidence of his right to practice law in Alabama; nor has respondent any knowledge or information of such right, except that he pretends to it, and frequents the courts. * * Respondent insists, that said Posey is a mere stirrer up of strife; and respondent believes that his object in coming into the mayor's court is not to promote justice, but to hinder, delay and defraud the public of justice. If said Posey had any right to practice in the mayor's court, respondent insists that he was bound to do it in a respectful manner, and for a proper purpose. Respondent, believing that said Posey has so conducted himself as to render him unfit to appear or be heard before respondent, and believing him to be not entitled to appear, admits that he does not intend to let him come before respondent as mayor in the character of an attorney-at-law. No person before respondent ever claimed said Posey as his attorney, or asked that said Posey be allowed to appear in his case. Respondent has

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been in the habit of admitting such of the legal profession as wished to come into his court and defend parties; but he has allowed it as a matter of courtesy, not of right, supposing that they came there from a proper motive. They demeaned themselves with propriety, which said Posey did not do."

The circuit court overruled the exceptions, and awarded a peremptory *mandamus*; from which ruling and decision said Withers now appeals, and here assigns the same as error.

R. H. SMITH, for the appellant.—1. That an appeal lies in this case, see Code, § 3016; *Etheridge v. Hall*, 7 Porter, 47; *Tarver v. Commissioners' Court of Tallapoosa*, 17 Ala. 527; *Falkner v. Commissioners' Court of Randolph*, 19 Ala. 177.

2. The petition shows no right in the relator to practice law. In it he alleges, under oath, that he is a "practitioner of law, *in all the courts of this State*." This is either an allegation of a right to practice in the supreme court, or it is not an allegation of a right to practice in any court; and as Mr. Posey was admitted to the bar of the supreme court only a few days ago, since his petition was filed and sworn to, the latter construction must be adopted, or he becomes involved in the crime of perjury. He may have practiced in the supreme court, or in any other court, without license or authority; but, unless he is an attorney, regularly licensed, and has taken the prescribed oath, he has no right to practice as an attorney in any court. For this reason, if for no other, the respondent's exception should have been sustained.

3. When a man asks to be restored to an office by *mandamus*, he must show clearly that he has the right, and that he has no other remedy. When Posey applied to practice before the mayor, he should have produced and exhibited his license as the evidence of his right, in order that the court might see whether he was entitled to practice, and in what courts.—7 East, 345; 1 Ala. 15; 25 Ala. 72. When the mayor's return to the rule

nisi is looked at, these objections become conclusive; and that return is to be taken as true.—9 Sm. & Mar. 77. Nor does the petition show that Posey was entitled to be heard before the mayor, on either of the occasions specifically mentioned. He alleges, that he *appeared* as counsel for the persons named; but not that he had been employed by them, or that either of them desired his services. In the case of Catherine Russell, moreover, it is shown that the mayor did nothing more than control the examination of witnesses, as he had undoubted right to do.—Municipal Laws of Mobile, 44, § 111. Besides, Posey's conduct and publications, as shown in the respondent's answer, were violations of his duty as an attorney, and justified the mayor in excluding him from the bar.—Rex v. Borron, 3 Barn. & Ald. 432. The petition only shows, at most, that Posey was denied the exercise of his right to practice law before the mayor on two specified past occasions—not that he has been deprived of his right to practice law.

4. *Mandamus* is not the remedy to restore the relator to his right generally to practice before the mayor.—*Ex parte Secombe*, 19 How. 9; Rex v. Canterbury, 8 East, 212; 1 Serg. & R. 187; 18 Wendell, 95. The case in 1 Johnson's Cases, 181, cited by the relator, is based on the peculiar legislation of New York, and has been since shaken, if not overturned.—Note to 2d edition, 184.

5. The broad proposition is maintained by the appellant, that an attorney has no right to practice before the mayor. Proceedings before the mayor, for the violation of municipal ordinances, are neither "civil causes," nor "criminal prosecutions," within the meaning of the 10th and 29th sections of the bill of rights: they are merely *quasi-criminal* proceedings.—23 Ala. 722; 8 Ala. 515; 27 Vermont, 360. If they were criminal prosecutions, they would have to be carried on in the name of the State, and conclude "against the peace and dignity of the same."—Constitution, art. 5, § 17. Besides, the 10th and 29th sections of the bill of rights secure rights to parties only, and have no reference to the rights of attorneys, which are left to be regulated by the legislature. Nor,

so far as the rights of parties are concerned, do they extend to and include proceedings before a police court. The constitutional provisions respecting the right to be heard by counsel and the right of trial by jury, are co-extensive, and borrowed from *Magna Charta*. They have no reference to petty offenses, but were intended to secure the people's rights in trials for high crimes. At common law, in all prosecutions for misdemeanors, the defendant had the right to be heard by counsel; but this right was held not to include a criminal inquiry before a justice of the peace as a committing magistrate.—Burn's Justice, 45; 4 Bla. Com. 356; 2 Barn. & Adol. 669; 3 Barn. & Ald. 432; 1 Barn. & Cress. 48; Bailey v. Delaplaine, 1 Sandford, 11; 2 Dev. & Bat. 451; 27 Vermont, 318, 325, 360; 11 Mass. 385; Tims v. The State, 26 Ala. 165. The right to be heard by counsel has never been supposed by the courts, either in England or America, to apply to the various police tribunals. Notwithstanding the broad language of the 28th and 29th sections of the bill of rights, proceedings are daily carried on before statutory tribunals, without either counsel or jury. Removal of infectious persons, destruction of clothes or other property infected with disease, quarantine laws, road laws, allotments of dower, *ad quod damnum* cases, and other similar proceedings, are instances in which great rights may be determined without jury or attorneys; for a trial by jury means a jury of twelve men. 1 Sandford, 11; 2 Barn. & Adol. 669; 1 B. & C. 48; 3 B. & Ald. 432. The charter of Mobile requires the mayor "to examine all witnesses that may appear or be subpoenaed before him, both on the part of the corporation, and on the part of the delinquents, and to give judgment as to him shall appear just and legal."—Municipal Laws, 44, § 111. The mayor's court is not provided with any prosecuting officer; the mayor is not supposed to be a professional man; the proceedings before him are somewhat summary; most of the cases tried before him do not require legal learning or abstruse investigation; and if any party desires counsel, or a jury, he can remove the case to a court where such things rightfully belong.

BEN LANE POSEY, *contra*.—1. The appellee moves to dismiss the appeal, on the ground that no appeal lies in such case. *Certiorari* is the only mode of reviewing a decision in a summary proceeding.—2 Wheaton's Selwyn, 1094; 13 Wendell, 130; 8 Peters, 291; 2 Mass. 444; 5 Mass. 422; 11 Mass. 465; 12 Johns. 30; Ld. Raymond, 213, 254, 454; 1 Salkeld, 144, 136; 3 Blackst. Com. 396; Viner's Abr. *Certiorari*, (D,) *Error*, (G;) 2 Tidd's Practice, 1078; 8 Mod. 27; 2 Binney, 80, 91; 1 Strange, 536; 2 Bro. P. C. 554; 2 Salkeld, 503; 2 Caines' Cases, 143; 2 Bacon's Abr. 189-91; 24 Ala. 98; 25 Ala. 74; 28 Ala. 436. It has never been decided by this court that a writ of error lies upon the award or refusal of a *mandamus*.— 3 Porter, 416; 7 Porter, 48; 18 Ala. 436; 19 Ala. 72.

2. The allegations of the petition sufficiently show the relator's right to practice law. He could not legally be "a practitioner of law," unless he was regularly licensed as an attorney. The term may not be a technical one, but in common usage its meaning is well defined and understood. It appears, also, that the relator had paid the city tax as an attorney, and it is not shown that his license was ever doubted, or required to be produced.

3. The great question of this case is, whether parties who are before the mayor of Mobile, either on trial or examination, have the right to be heard by counsel. If they have such right, counsel must have the right to appear for them. The 10th and 29th sections of the bill of rights are conclusive on this point. Sections 3400, 3401, and 3403 of the Code, are equally clear. Section 729 of the Code declares, that attorneys shall practice "in the courts of this State." Section 34 of the city charter requires the mayor to hold "a court" daily. Sections 33, 34, 111, and 112, define the powers of the mayor, and prescribe the proceedings before him. He is a justice of the peace—nothing more, and something less: he issues process as a justice of the peace; he has the same general criminal jurisdiction as a justice of the peace; he tries for the violation of city ordinances as a justice of the peace, and his judgments are enforced

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by *fieri facias* as before a justice of the peace.

4. If the relator had the right to appear before the mayor, *mandamus* is his proper remedy.—See numerous cases above cited; also, *People v. Justices of Delaware*, 1 *Johnson's Cases*, 181.

R. W. WALKER, J.—1. The motion to dismiss the appeal must be overruled. It is well settled by our previous decisions, that an appeal lies to this court, from a judgment of the circuit court, awarding or refusing a *mandamus*.—*Etheridge v. Hall*, 7 Porter, 47; *Tarver v. Comm'rs' Court of Tallapoosa*, 17 Ala. 527; *Falkner v. Judge, &c.*, 19 Ala. 177; *Brooks v. Kirby*, 19 Ala. 74; *Riggs v. Pfister*, 21 Ala. 469; *Tenn. & Coosa Rivers R. R. Co. v. Moore*, at this term.

2. The invariable test, by which the right of a party applying for a *mandamus* is determined, is to inquire, first, whether he has a clear legal right; and if he has, then, secondly, whether there is any other adequate remedy to which he can resort, to enforce his right.—*People v. Thompson*, 25 Barb. 76. In this case, the relator fails to show a clear legal right to practice in the mayor's court, or, indeed, in any of the courts of this State. The only persons who are entitled to practice in the courts of this State, are those who were regularly licensed under the laws of this State before the adoption of the Code, and those who, since the adoption of the Code, have been admitted by a license from the supreme court, the court of chancery, or a circuit court.—Code, § 729. Persons licensed since the adoption of the Code, are not entitled to practice, until they take the oath prescribed by section 735; and those who were regularly licensed before the passage of the Code, "can practice only in such courts as their license authorizes them."—Code, § 730. The relator alleges, that "he is a practitioner of law in all the courts of this State, both of state and federal jurisdiction." We do not think that this is a sufficient allegation of his legal right to practice in the courts named. It is not alleged, nor was it shown on the hearing of the application, that the relator was regularly licensed

under the laws of this State before the adoption of the Code, or that he had since that time been admitted by a license from a court competent to grant it, and had taken the oath prescribed. The essential prerequisites to a legal right to practice in any of the courts of this State not having been alleged, the 3d exception to the petition should have been sustained, and the court erred in awarding the *mandamus*. In a proceeding of this sort, the relator must distinctly aver all the facts necessary to give him the right which he claims.—See Tapping on *Mandamus*, 27-8, 186, 193, 293-4, 320-1; *Rex v. Jotham*, 3 Term R. 178; *Kimball v. Morris*, 2 Metc. 573, 576; *Cullum v. Latimer*, 4 Texas, 329; 1 Chitty's Prac. 798, 800, 808; *The King v. Bishop of Oxford*, 7 East, 345; *Queen v. Mayor*, 13 Ad. & Ell. (N. S.) 1; see the forms pursued in 19 How. (U. S.) 9.

We do not inquire whether the allegations of the petition were in other respects sufficient.

3. We might stop here; but, if we did so, the main question involved in this controversy would be left unsettled; and, under the circumstances, we feel it our duty to declare our views in regard to it. That question is, whether an attorney, who has obtained a license from the supreme, circuit, or chancery court, and taken the prescribed oath, has a legal right to practice in the mayor's court in Mobile.

We do not think that the 10th and 29th sections of the bill of rights, (Const. of Ala. art. 1, §§ 10, 29,) apply to proceedings before a mayor, for the violation of city ordinances. The 10th section declares, that "in all criminal prosecutions, the accused has the right to be heard by himself and counsel." The common-law definition of a *crime*, as given by Blackstone, is, an act committed or omitted in violation of a public law, (4 Blackst. Com. 3;) and the term "criminal prosecutions," as employed in the constitution, relates exclusively to prosecutions for violations of the public laws of the State. A city ordinance is not a public law of the State, but a local law of a particular corporation, made for its internal police and good government. Moreover, if municipal cases before

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a mayor of a city or town were "criminal prosecutions" in the sense of the constitution, they would have to be carried on in the name of the State, and conclude "against the peace and dignity of the same."—Const. of Ala. art. 5, § 17. It would follow, also, that an acquittal or conviction before the mayor would be a bar to any other prosecution for the same offense, which, it is well settled, is not the case.—See *Mayor of Mobile v. Rouse*, 8 Ala. 515; *State v. Estabrook*, 6 Ala. 653; *Williams v. City Council*, 4 Geo. 509; *Floyd v. Commissioners*, 14 Geo. 354; *Mayor of Mobile v. Allaire*, 14 Ala. 400.

Nor are these proceedings for violations of city ordinances "*civil causes*," in the sense of the 29th section of the bill of rights, which declares, that "no person shall be debarred from prosecuting or defending any *civil cause*, for or against him or herself, before any tribunal in this State, by him or herself or counsel." The civil causes here spoken of are those which deal with *private wrongs*; that is, with acts which constitute an infringement or privation of the private or civil rights belonging to individuals. These terms, therefore, include only those legal proceedings which seek *redress* for civil injuries. But city ordinances are *punitive* regulations; and the object of a proceeding for the violation of them, is not redress for a civil injury, but the punishment of an offender against the peace and good order of society. Hence, they are termed *quasi-criminal* proceedings.—See *Brown v. Mayor of Mobile*, 23 Ala. 722; *Mayor of Mobile v. Rouse*, 8 Ala. 515; *Mayor v. Allaire*, 14 Ala. 400. We must, therefore, look elsewhere for the right of counsel to appear on the trial of municipal cases before the mayor.

It is provided by the Code, that persons admitted to the supreme court, after the adoption of the Code, "may practice in all the courts in this State;" and those admitted by any chancery or circuit court, "may practice in any court of the State, except the supreme court."—Code, § 730. Is the court which the mayor of Mobile holds for the trial of offenders against the municipal laws of the city, "a court in this State," within the meaning of this section of the Code? It would be an unwarrantable perversion of plain language to hold that it is not. According

to Lord Coke, "a court is a place where justice is judicially administered."—1 Coke's Littleton, 58 (*a.*) In *Groenvelt v. Burwell*, (1 Salkeld, 200,) Chief-Justice Holt said: "Whenever a power is given to examine, hear and punish, it is a judicial power, and they in whom it is reposed act as judges; and whenever there is a jurisdiction erected, with power to fine and imprison, that is a court of record, and what is there done is matter of record." See, also, 3 Blackst. Com. 24-5. By the city charter, the mayor is required to hold "a court," daily, for the trial of all offenders against the laws and ordinances of the corporation. He issues process, as a justice of the peace, for the arrest of offenders; subpœnas and examines witnesses, both for the corporation and the defendant, and gives judgment as shall appear to him legal and just, which is enforced by execution, to be issued by the clerk of the corporation.—Municipal Laws of Mobile, p. 18, § 34; p. 44, §§ 111, 112. The court which the mayor holds is an "inferior jurisdiction," in the sense of the constitution, and is, therefore, subject to the general superintendence and control of the supreme court.—Const. of Ala., art. 5, § 2. Its proceedings may be revised by the circuit court, and afterwards by this court; and its judgments, in matters within its jurisdiction, are final and conclusive until reversed or set aside.—*Intendant of Marion v. Chandler*, 6 Ala. 899. Here are all the characteristics of a court—an officer, sitting at stated times appointed by law, authorized to bring parties and witnesses before him, and clothed with the power to hear evidence, to decide questions of law and of fact, to try and determine causes according to legal rules, to punish offenders, and to render judgments, which are enforceable by execution, and final and conclusive until reversed or set aside by a revising tribunal.

The constitutional and statutory provisions securing to suitors and accused persons the right to the aid of counsel, and section 730 of the Code, defining the courts in which attorneys have the right to practice, all relate, directly or indirectly, to the same subject-matter. For the right of a party to the aid of counsel, in any particular proceeding or court, would be a barren right, if there were no

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counsel authorized to appear in his behalf. While, therefore, it is true that the constitutional and statutory provisions securing to parties the right to the assistance of counsel do not apply to the trial of municipal cases before a mayor; yet they serve to indicate the general spirit and policy of our laws upon the subject; and we should strive to put such a construction upon section 730 of the Code, as will make it harmonize with that spirit and policy.

We have already observed, that by the constitution, the right to be heard by himself and counsel, is secured to the accused in all "criminal prosecutions."—Const. art. 1, § 10. These terms include every prosecution for a violation of the criminal laws of the State, in a court authorized to determine the question of guilt or innocence by a judgment of acquittal or conviction, no matter how trifling the alleged offense, or how insignificant the punishment awarded. In like manner, the parties to the pettiest "civil cause" that may be tried before a justice of the peace, or "any tribunal in this State," have a constitutional right to the aid of counsel.—(Const. art. 1, § 29.) In all preliminary inquiries before committing magistrates, no matter what the grade of the offense charged, the legislature has secured to the accused the right to the aid of counsel, although such an investigation is not, in a legal sense, a *trial*, which means an inquiry in which the guilt or innocence of the accused is finally passed upon. The committing magistrate exercises an authority judicial in its nature, but is not clothed with judicial power. He has no authority to acquit or condemn. His action does not conclude either the State or the accused. He may discharge the defendant, and yet the grand jury may indict, and the petit jury convict him. He may bind the party over, but the grand jury can ignore the bill. Hence, it has been said, that a committing magistrate does not act as a court of justice, but only as an officer deputed by law to conduct a preliminary inquiry.—See *Ex parte Gist*, 26 Ala. 161-2; *Cox v. Cole-ridge*, 1 Barn. & Cress. 37, 50, 52-3-4.

A trial before a mayor, for a breach of city ordinances, may often involve much more serious consequences to

the accused than a prosecution by indictment in the circuit court, a civil cause before a justice of the peace, or a preliminary investigation before a committing magistrate. In all of these last named proceedings, the right to the aid of counsel is carefully secured; and the law would be inconsistent, if it denied the same right to persons on trial for a violation of city ordinances. It not unfrequently happens, indeed, that the same act is a violation of the public law of the State, and also of the police regulations of a corporation; and it is at least supposable, that the punishment prescribed by the corporation might, in some cases, be more severe than that provided by the legislature for the same offense. If, in such a case, the party were prosecuted, as he well might be, both before the mayor and the circuit court, it would seem anomalous, as well as unjust, to concede the right to the aid of counsel in the court where the punishment would be slight, and to deny it in the court where the punishment would be severe.

On the whole, our opinion is, that an attorney, who has been regularly admitted to practice in accordance with the provisions of the Code, has a legal right, when employed for that purpose, to appear as counsel for persons on trial before the mayor of Mobile, for alleged violations of the city ordinances.

The right of such an attorney to appear as counsel for the accused, on a preliminary inquiry before the mayor as a committing magistrate, is also clear, though it stands upon a somewhat different footing. By the city charter, the mayor has the power "to examine and commit, or discharge on bail, all persons charged with offenses not capital, in the same manner as justices of the peace." Municipal Laws of Mobile, p. 16, § 33; Acts 1843-4, p. 181, § 16. The Code expressly provides, that on preliminary investigations before committing magistrates, "the defendant may appear by counsel."—Code, § 3403. This section of the Code is as applicable when the preliminary inquiry is had before the mayor as a committing magistrate, as when it takes place before a justice of the peace, or a judge of the circuit court.—Code, § 3339. It would

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be singular, indeed, if a defendant had the right to the aid of counsel before one committing magistrate in Mobile, but had not the same right before another committing magistrate in the same city. The right of the defendant to have counsel appear for him, implies the right of some counsel to appear; and, to effectuate the intention of the legislature, we hold, that an attorney who has been admitted to practice in accordance with the provisions of the Code, has the right, on being employed for that purpose, to appear as counsel for the defendant on a preliminary inquiry before the mayor of Mobile, or any other committing magistrate.

4. Under the provisions of the Code in relation to attorneys, the right to practice, which is obtained upon procuring license and taking the prescribed oath, is a legal right, of which the attorney cannot be deprived, except by a judgment of removal or suspension, rendered by the circuit court, on proceedings instituted in conformity with the directions contained in chapter 10, title 9, part 1, of the Code.—See §§ 747 to 761. These proceedings are begun by an accusation in writing, which the attorney is cited to answer. If he denies the accusation, the court proceeds to try the same; the attorney having the right to demand a trial by jury. Witnesses may be summoned, and depositions taken, as in ordinary actions at law. A judgment of acquittal is final, but from a judgment of removal or suspension, the accused may appeal to this court.—Code, §§ 750–9.

One of the duties of attorneys, as these are defined by section 738 of the Code, is “to maintain the respect due to courts of justice and judicial officers;” and among the specified causes for the removal or suspension of an attorney, is any willful violation of this duty.—See § 748. But, until such removal or suspension has been effected by a judgment rendered in the circuit court, in a proceeding instituted for that purpose, no court in this State can lawfully deny to a regularly licensed attorney the right to practice in causes tried before it, upon the ground that the attorney has, on some past occasion, spoken disrespectfully of, or conducted himself in a manner offensive

to the court. Any "disrespectful, contemptuous, or insolent behavior in court, tending in any wise to diminish or impair the respect due to judicial tribunals, or to interrupt the due course of trial," is a contempt of court, for which the offending party may be punished in the summary manner provided by law.—Code, §§ 561–2–3. But contempts must be punished as they occur, and in the summary way directed; and a court cannot, *ex mero motu*, punish an attorney for offenses of this nature, or, indeed, for any misconduct, by a general denial of his right to practice before it. Willful misconduct in his profession, and willful violations of any of the duties enjoined upon him by law, will justify a proceeding in the circuit court for the removal or suspension of an attorney, and a judgment in either form will deprive him of his right to practice in any court. But, until such judgment is rendered, unprofessional or disrespectful conduct on the part of an attorney, though amounting to a contempt, and though furnishing sufficient cause for his removal or suspension, will not justify a court in excluding him from practicing at its bar.

5. When an attorney, who has not been removed or suspended in the mode pointed out by the Code, is prohibited by any court in which his license authorized him to practice, from appearing before it as counsel in causes in which he has been employed, this is the deprivation of a clear legal right, to the enjoyment of which he will be restored by *mandamus*. If the writ would not lie in such a case, the party would be without any adequate remedy for the wrong complained of. There are some cases in which it has been held, that *mandamus* would not lie, to restore an attorney who had been dismissed by order of court. But these are cases in which a formal order of dismissal had been made, and in which, moreover, it rested exclusively with the court making the order to determine who was qualified to become or continue an attorney of the court. Under such circumstances, the order of dismissal is held to be a judicial act, done in the exercise of a judicial discretion vested in the court by law; and a *mandamus* cannot be issued by a superior court, commanding it to reverse its decision, and restore the attorney to the

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office he has lost. But, under our system, it does not rest exclusively with the several courts to determine who is qualified to become or continue an attorney of the court. On the contrary, as we have already seen, an attorney admitted by the supreme court has the legal right to practice "in all the courts in this State,"—a right of which he can be deprived only in the mode pointed out by law—that is, by a judgment of removal or suspension, rendered by the circuit court, and founded on some of the causes specified in the Code. If an attorney, who has obtained a license, and taken the proper oath, in conformity with the requirements of the Code, is prohibited from practicing in the mayor's court in Mobile, his right to a *mandamus* is clear, both upon principle and authority. Hurst's case, 1 Levinz, 75; Hastings' case, 1 Modern, 23; Rex v. Barker, 3 Burr. 1267-8; The King v. Sheriff of York, 3 B. & Ad. 770; Queen v. Lord Mayor, 13 Ad. & Ell. (N. S.) 1, 31; People v. Turner, 1 California R. 190; Tapping on *Mandamus*, 44-5, and cases cited; 6 Bacon's Abr. 424.

Judgment reversed, and cause remanded.

HENRY (A SLAVE) vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Charge ignoring proof of venue.*—A charge to the jury, instructing them that, on a hypothetical state of facts, not including proof of the venue, the prisoner "would be guilty as charged," is erroneous, and will work a reversal of the judgment of conviction, although the record shows that it was given "among other charges."

FROM the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

Henry (a slave) v. The State.

THE indictment in this case charged the prisoner, in several counts, with the murder and manslaughter of one James Griffith, a white person.—See the report of the case in 33 Ala. 389, where the indictment is set out in full. The bill of exceptions in the present record, after setting out all the evidence in substance, states, that “the court thereupon charged the jury, (among other things,) that to justify the taking of human life, there must be an imperious necessity; and if the prisoner, without such necessity, killed the deceased by stabbing him with a knife, he would be guilty as charged; to which charge the prisoner excepted.”

E. W. PETTUS, for the prisoner, contended that the charge was erroneous, under the authority of the following cases: Corbett v. The State, 31 Ala. 329; Huffinan v. The State, 28 Ala. 48; Brown v. The State, 27 Ala. 47; Salomon v. The State, 27 Ala. 26.

M. A. BALDWIN, Attorney-General, *contra*.—The charge of the court is not obnoxious to the objection, that it authorized a conviction without proof of the venue. The words “he would be guilty as charged,” do not refer to the venue: the only charge in the indictment is, that the prisoner is guilty of murder. Moreover, if the objection be well taken, its effect is obviated by the fact that other charges, not set out, were given.

A. J. WALKER, C. J.—The charge, for the giving of which the judgment of the circuit court was reversed in the case of Farrell v. State, (32 Ala. 557,) instructed the jury that, upon a certain hypothesis, not including proof of the venue, “the defendant would be guilty as charged.” The first charge in this case instructed the jury, that upon a certain hypothesis, not including proof of the venue, the defendant “would be guilty as charged.” It is utterly impossible to distinguish between the charge in this case and the charge in Farrell v. The State, so far as it concerns the objection that it authorized a conviction without a belief on the part of the jury, from the evidence, that

the offense was committed in the county in which the indictment was found. We are, therefore, constrained by the authority of the case above cited, to reverse the judgment in this case.—See, also, Spaight v. State, 29 Ala. 32; Huffman v. State, 28 Ala. 48; Salomon v. State, 27 Ala. 26; Brown v. State, 27 Ala. 47.

Judgment reversed, and cause remanded; and the prisoner must remain in custody, until discharged by due course of law.

BRYANT *vs.* THE STATE.

[INDICTMENT FOR MURDER.]

1. *Execution of bill of exceptions.*—The term of the circuit court having expired by law at twelve o'clock on Saturday night, a bill of exceptions, signed by the presiding judge on the next morning, "before the verdict and judgment and sentence of the court, or either of them, had been entered on the minutes of the court, and before the minutes were signed," cannot be considered as having been signed during the term.
2. *Sufficiency of indictment in description of person slain.*—An indictment for the murder of "—— Butler, whose christian name is to the grand jury unknown," is sufficient under the provisions of the Code.

FROM the Circuit Court of Tuscaloosa.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case was found at the March term, 1859, of said circuit court; and charged that Stephen A. Bryant and others, whose names were specified, "unlawfully and with malice aforethought killed —— Butler, whose christian name is to the grand jury unknown." The prisoners each pleaded not guilty, without raising any objection to the form or sufficiency of the indictment.

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The jury returned a verdict of guilty against Stephen A. Bryant, and not guilty as to the others. The record contains a bill of exceptions, dated April 8th, 1860, which purports to have been "signed and sealed by the judge before the verdict and judgment and sentence of the court, or either of them, had been entered on the minutes of the court, and before the minutes were signed;" but the decision of this court renders any further notice of it unnecessary.

E. W. PECK, for the prisoner, argued the points presented by the bill of exceptions, and further contended, that the indictment was fatally defective, because it did not contain a sufficient description of the person slain; citing to this point the following authorities: 1 Chitty's Crim. Law, 174-5, 203, 215; Rex v. Mary Smith, 25 E. C. L. 327; Russ. & Ryan, 489; 7 Iredell, 29; 1 Scammon, 399; Francois v. The State, 20 Ala. 83; 1 Archb. Cr. Pl. 81, n. 1.

J. H. & P. A. FITTS, with whom was M. A. BALDWIN, Attorney-General, *contra*.—1. The term of the court expired by limitation at twelve o'clock on Saturday night, the 7th April.—Nabors v. The State, 6 Ala. 203. As the bill of exceptions shows on its face that it was signed on Sunday, the 8th April, it cannot be considered any part of the record.—Code, § 2358.

2. The indictment is sufficiently certain under the provisions of the Code.—24 Ala. 672; Code, § 3505.

STONE, J.—It was declared in the case of Nabors v. The State, (6 Ala. 200,) and must be regarded as settled, that the terms of our circuit courts expire at 12 o'clock of the last Saturday night of the terms fixed by law.—See, also, State, *ex rel.* Battle, 7 Ala. 259. It is also well settled, (and we have no authority to disregard this statutory rule,) that a bill of exceptions, not signed during the term, or within ten days thereafter pursuant to consent of counsel in writing, is not a part of the record.—Code, §§ 2358, 3649; Shep. Digest, 435, § 4; Stein v. McArdle, 25 Ala. 561. Under these plain rules, we cannot look,

for any purpose, to what is claimed in this record as a bill of exceptions. This narrows our inquiry to what appears on the face of the indictment, as it is now presented.

[2.] The alleged defect in the present indictment, and which is pressed on our consideration for a reversal, is, that it does not sufficiently identify and describe the person alleged to have been slain. The indictment charges, that the defendant "killed — Butler, whose christian name is to the grand jury unknown." In 2 Hale's Pleas of the Crown, 181, it is said: "An indictment of murder *cujusdam ignoti* is good."—See, also, Hawk. P. C. book 2, ch. 25, § 71; Whar. Am. Cr. Law, § 251; State v. Lewin, 5 Blackf. 343; Rex v. Mary Smith, 6 C. & P. 151; Rex v. Campbell, 1 C. & K. 82; 3 Greenl. Ev. § 22. In the case of the State v. Jackson, (4 Blackf. 49,) the person was described as "an Indian of this State, of the Miami nation of Indians, the name of which said Indian to the jurors aforesaid is wholly unknown." So, in Reed v. The State, (4 Ark. 497,) the person slain was described as "a certainly, and-dotte Indian, whose name is unknown to the grand jury." These averments were ruled sufficient. So, in Cameron v. The State, (13 Ark. 712,) the defendant was indicted for assaulting "one Rice, whose christian name is to the grand jurors aforesaid unknown;" and the conviction was sustained. The Code of Alabama (section 3505) declares, that "The indictment must be certain, as to the person charged; but when his name is unknown to the jury, it may be so alleged without any further identification." This is a legislative declaration that, "to the party charged, the words that his name is to the grand jurors unknown, supply the requisite certainty." We can perceive no reason for requiring greater certainty in the description of the party slain, than the statute requires in describing the party accused; although it is admitted that the effect of a misdescription in the former case may be more serious than in the latter. We regard section 3505 of the Code as indicating a policy to be observed on kindred questions.

The judgment of the circuit court is affirmed, and the sentence of the law must be executed.

HEATH *vs.* THE STATE.

[INDICTMENT FOR RESISTING PROCESS.]

1. *Validity of official acts of officer de facto.*—The official acts of an officer *de facto* are valid, so far as the rights of the public, or of third persons having an interest therein, are concerned, and cannot be indirectly called in question in a proceeding to which he is not a party; consequently, under an indictment for resisting the execution of process by a constable, it having been shown that the constable was exercising the duties of that office under color of an election, and that the process in his hands was such as it is the right and duty of constables to execute, the defendant cannot be permitted to prove that, by reason of a taint in his blood, the constable was constitutionally incapacitated to hold any civil office.

FROM the Circuit Court of Autauga.

Tried before the Hon. PORTER KING.

THE indictment in this case charged, that the defendant, Seaborn Heath, “did knowingly and willfully oppose or resist William Chavis, a constable of said county, in attempting to serve or execute a peace-warrant, or writ of arrest, issued by Robert Kerr, a justice of the peace of said county.” The case was before this court at its June term, 1859, when the judgment of the circuit court was reversed, and the cause remanded.—See 34 Ala. 250. On the second trial below, as the bill of exceptions in the present record shows, “the State introduced legal evidence, showing that, within twelve months before the finding of the indictment in this case, one William Chavis had been elected a constable in said county, and had duly qualified as such constable; that whilst said Chavis was acting as such constable, a warrant of arrest, called a peace-warrant, which was in all respects regular and legal, was placed in his hands as such constable, authorizing and commanding him to arrest the defendant; that he attempted to arrest the defendant, under and by virtue of said process, before the finding of the indictment in

this case; and that the defendant opposed and resisted him in the execution of said process, and refused to permit him to execute the same, on the ground, as said defendant alleged at the time, that said Chavis was not a white man, and was incompetent to act as an officer, or to execute process." The State having here closed, the defendant offered to prove, "by legal testimony," that the paternal grandmother of said Chavis was the daughter of two mulattoes, each of whom was the child of a full-blooded negro and a white person; "which proof was offered for the purpose of showing that said Chavis was not a free white male person, within the meaning of the constitution and laws of this State, but was descended from negro ancestors to the third generation inclusive, although one ancestor of each generation may have been a white person; and that the election of said Chavis as a constable was an absolute nullity: and that, as a free negro, he was incompetent to execute, or to attempt to execute said process on the defendant, at the time he was opposed and resisted by said defendant as aforesaid; and that the defendant had the right to resist said Chavis in the execution of said process, to a sufficient extent to prevent himself from being arrested by a free negro." The court excluded the evidence, and the defendant excepted.

WATTS, JUDGE & JACKSON, for the prisoner.—Under the constitution and laws of this State, only "free white male persons" are eligible to office.—Code, §105. The general proposition is undoubtedly true, that the colorable election and induction of a person into office, and some action thereunder by him, constitute him an officer *de facto*, so long as he exercises the duties of the office. *Burke v. Elliott*, 4 Iredell's R. 355; *Pearce v. Hawkins*, 2 Swan, 87. Although the cases have gone a great way in supporting this proposition, "they have stopped with preventing mischief to such as confide in officers who are acting in that right."—*Green v. Burke*, 23 Wendell, 502. But in a government of white men, where the negro has no political *status* as a person or citizen, a free negro cannot be recognized as an officer *de facto*, because he can never

become an officer *de jure*. An officer *de facto* is, *prima facie*, an officer *de jure*.—Allen v. The State, 21 Geo. 217. But a negro can never be, *prima facie*, an officer *de jure*. It is contrary to public policy, in a slave State, that a negro should be recognized as an officer under any circumstances. Suppose a sheriff should appoint a full-blooded negro as his deputy; would it be the duty of white persons to submit to him as an officer *de facto*?

WM. L. YANCEY, with whom was M. A. BALDWIN, Attorney-General, *contra*.—An officer *de facto*, acting under color of an election or commission, is a legal officer as to all parties, except in a direct proceeding to set aside his commission. His official acts, when they concern the public, are valid; and even a constitutional disqualification on his part to fill the office, does not affect their validity.—Wilcox v. Smith, 5 Wendell, 231; McIntire v. Tanner, 9 Johns. 135; People v. Collins, 7 Johns. 549; People v. Hopson, 1 Denio, 574; People v. Stevens, 5 Hill, 630; Smith v. The State, 19 Conn. 493; Sasnett v. Weathers, 21 Ala. 673; 1 Texas, 653.

R. W. WALKER, J.—Our opinion is, that the court did not err in excluding the evidence offered by the defendant.

It is well settled, upon great principles of public policy, that the acts of an officer *de facto*, whether judicial or ministerial, are valid, so far as the rights of the public, or third persons having an interest in such acts, are concerned; and that neither the title of such an officer, nor the validity of his acts as such, can be indirectly called in question, in a proceeding to which he is not a party. This doctrine dates as far back as the Year-Books, and it stands confirmed, without any qualification or exception, by a long line of adjudications, both in England and in the United States.—King v. Corporation of Bedford Level, 6 East, 366; 1 Blackst. Com. 204, 37; Mays v. Stonum, 2 Ala. 390; Sprowl v. Lawrence, 33 Ala. 688; People v. Hopson, 1 Denio, 579; People v. White, 24 Wend. 526; State v. Alleny, 12 Ohio, 16; Gilliam v.

Reddick, 4 Ired. 368; Wilcox v. Smith, 5 Wend. 232; McIntry v. Tanner, 9 Johns. 125.

The authorities are, perhaps, not entirely uniform in the definition of an officer *de facto*; but they all concur in recognizing as such any person who exercises the duties of an office, under color of an appointment or election to that office. Lord Ellenborough's definition is less restrictive; for he defines an officer *de facto* to be, one "who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." —King v. Corporation of Bedford Level, 6 East, 366.

It was an undisputed fact in this case, that Chavis was exercising the duties of constable, under color of an election to that office, and that the process he was seeking to enforce was such as it is the right and duty of constables to execute. He was, therefore, an officer *de facto*, and was acting as such. That by reason of a taint in his blood he was constitutionally incapacitated from holding any civil office in Alabama, and, therefore, could never be a constable *de jure*, cannot alter the stubborn fact that he was elected constable, exercised the duties of the office under color of that election, and thereby became an officer *de facto*.

If the rejected evidence had been admitted, and had satisfied the jury that Chavis "was descended from negro ancestors within the third generation inclusive, although one ancestor of each generation may have been a white person," it would not have had the effect of ousting him from office; and the judgment would have been worthless as evidence in any other proceeding where his title to the office, or any other acts of his in discharge of its duties, might be drawn in question. In a direct proceeding, where he himself was a party, he would have an opportunity of defending his title; and the evidence in relation to his eligibility, and consequently the conclusion of the jury as to his right to the office, and the validity of his official acts, might be altogether different. The mischief would be intolerable, if persons whose rights depend on the acts of officers *de facto*, whether judicial or ministerial, could be called on in every proceeding

involving those rights, to enter into an inquiry into the pedigree of the individuals holding the offices.

The evils which it is suggested may result, if we sustain the ruling of the circuit judge, are altogether fanciful. In our state of society, it is hardly conceivable that civil offices will ever be conferred on any persons who are known not to be free white males. It is fair to presume, that if any others should be elected to, or hold such offices, they would be persons whose antecedent history was unknown, and whose personal appearance would furnish no indication of the impure blood which is visited with civil incapacity. The necessity of protecting the rights of individuals, securing the public peace, and maintaining the supremacy of law, requires that the official acts of such persons should not be invalidated, nor their title to the office annulled, in any proceeding to which they are not parties.

It was not proposed to prove that Chavis was a slave, but that he was a free negro. And our decision is, that for the purposes for which it was offered, the evidence was inadmissible.

Judgment affirmed.

WELCH vs. THE STATE.

[SCIRE FACIAS AGAINST BAIL ON FORFEITED RECOGNIZANCE.]

1. *Sufficiency of recognizance, and admissibility of parol evidence in aid of it.*—A demurrer does not lie to a *scire facias* against bail, because the offense charged in the indictment is intentionally injuring telegraph wires, while in the *capias*, bail-bond and *scire facias*, it is described as malicious mischief; nor can the bail avail themselves of the supposed variance by motion to exclude the *capias* and bail-bond; but those papers may be connected with the pending indictment to which they relate, by the parol testimony of the sheriff and clerk.

APPEAL from the Circuit Court of Clarke.
Tried before the Hon. C. W. RAPIER.

IN this case, an indictment was found against Columbus Stewart and Bryant Singleterry, at the fall term of said circuit court, 1857, charging that they "did cut, pull down, destroy, or in some manner injure intentionally the telegraph line running through said county, or some part or parts of said telegraph line." The defendant Stewart was arrested under a *capias*, issued at the same term, and purporting to be founded on an indictment "for the offense of malicious mischief," alleged to have been found at that term; and thereupon gave bail, with William R. Welch and Arthur M. Davis as his sureties, conditioned for his appearance "to answer an indictment pending in said court against him for malicious mischief." Stewart having failed to appear, a judgment *nisi* was taken against him and his sureties, and a *scire facias* thereon issued, which was served on the sureties only. The sureties craved oyer of the indictment, bail-bond and *capias*, and demurred to the *scire facias*, "for the variance between said indictment and the bail-bond and *scire facias*." The court overruled their demurrer, and they then pleaded, "that at the time said bail-bond was executed, as set forth in said *scire facias*, there was no such indictment pending in said circuit court of Clarke against said Stewart as is set forth in said bail-bond and *scire facias*;" and on this plea issue was joined.

On the trial, as the bill of exceptions shows, the State read the *scire facias* in evidence, and then offered to read the *capias*, and to prove, by the clerk of the court, that it was issued by him on the indictment above described. The defendants objected to the reading of the *capias* "because of the variance between the recitals of the *capias* and of the indictment." and also to the parol testimony of the clerk; the court overruled their objections, and they excepted. In like manner, the court permitted the State to read the bail-bond in evidence, and to prove by the sheriff that he took said bail-bond from Stewart when arrested under said *capias*; and to these rulings of the court exceptions were

likewise reserved. The rulings of the court above stated are now assigned as error.

R. C. TORREY, for the appellants.—Intentionally injuring a telegraph wire is a different offense from “malicious mischief.—Code, §§ 3114, 3116, 3118; Session Acts 1855–6, p. 6. That parol evidence was inadmissible for the purpose for which it was received, see *Deslonde v. Darrington*, 29 Ala. 92; *Martin v. Barney*, 20 Ala. 367; *Litchfield v. Falconer*, 2 Ala. 280; *Thomason v. Odum*, 31 Ala. 108; *West v. Galloway*, 33 Ala. 306; *King v. Jemison*, 33 *ib.* 500.

M. A. BALDWIN, Attorney-General, *contra*, cited *The State v. Eldred*, 31 Ala. 393; *Vasser v. The State*, 32 Ala. 586.

A. J. WALKER, C. J.—On the authority of *The State v. Eldred*, (31 Ala. 393,) and *Vasser v. The State*, (32 Ala. 586,) the judgment of the circuit court is affirmed.

BIRD vs. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Conviction on testimony of accomplice.*—A conviction cannot be had on the uncorroborated testimony of an accomplice, (Code, § 3600,) although such accomplice was also examined as a witness before the grand jury.

FROM the Circuit Court of Choctaw.
Tried before the Hon. C. W. RAPIER.

The bill of exceptions in this case was as follows :
“On the trial of this case, one Callahan, a witness for

the State, testified that he was a witness before the grand jury, and then stated the facts on which the indictment was found: that within twelve months before the finding of the indictment, and during the present term of the circuit court, the defendant, with some eight other persons, played with cards at a game called *poker*; that said playing was done in the county jail, in a room in the second story, usually called 'the debtors' room;' that one H. H. Smith was the jailor, and lived, with his family, in the second story of said jail, and occupied the west end of the building, and had control of the building; that the playing was by consent of said Smith; that there was no prisoner in said debtors' room; that he (witness) played in said game with the defendant and the others; that he was boarding with said Smith, and had paid him for board, without any demand being made for the same by said Smith, although Smith did not usually charge him board. There was other evidence, showing that said house was the county jail, and was situated in the town of Butler; and that there was one prisoner in the jail. It was in evidence, also, that when the grand jury went to examine the said jail, there was no prisoner in the debtors' room, but that there was some bed-clothing deposited therein, which the witness supposed to belong to the jailor. This was all the evidence in the cause; and thereupon the court charged the jury, that if they believed the evidence, they must find the defendant guilty. The defendant excepted to this charge, and then requested the court to instruct the jury, that a conviction could not be had on the testimony of an accomplice, unless he was corroborated by such other evidence as tended to connect the defendant with the commission of the offense, or the circumstances thereof. The court refused this charge as asked, but gave the charge to the jury in the event they should believe that said Callahan was not examined before the grand jury as a witness in the case; and to this refusal the defendant excepted."

G. F. SMITH, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—The only witness who testified in this case, was, under the decision in the case of *Davidson v. The State*, (33 Ala. 350,) an accomplice of the defendant, in the game for which he was on trial. The circuit court ruled, that a conviction could be had on the uncorroborated testimony of an accomplice, if that witness had been examined on the preliminary inquisition before the grand jury. In this the circuit court erred.—Code, §§ 3246–7–8.

Reversed and remanded.

DONOHOO vs. THE STATE.

[INDICTMENT FOR BURGLARY IN STORE-HOUSE.]

1. *What constitutes burglary.*—Getting into the chimney of a house, with intent to steal, is a sufficient breaking and entering to constitute burglary, although the party does not enter any of the rooms of the house.
2. *Abstract charge.*—An abstract charge is properly refused.

FROM the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THE indictment in this case charged the prisoner, Enoch Donohoo, with breaking and entering the store-house of Messrs. Tucker & Collins, in the town of Opelika, with intent to steal. The bill of exceptions is in the following words:

“The State introduced a witness who testified, that Tucker & Collins were the owners of a store-house in Opelika, in said county, in which articles for sale and deposit were kept; that said building was hip-roofed, and one story high; that some five or six weeks before the sitting of the present term of the circuit court,

between the hours of nine and eleven o'clock at night, a noise was heard in the chimney of said store-house, and, on examination, the defendant was found in the chimney, so tight and fast that he could not be pulled out, either at the top of the chimney, or at the fire-place below, and the chimney had to be pulled down to extricate him; that he had descended so low that his feet were about two feet above the arch of the fire-place; that it was impossible for him to have descended any lower down the chimney, the aperture being too small; that the funnel of said chimney was on the outside of the house, but the lower part of the chimney was partly in the house, the jambs coming some nine or ten inches inside of the walls; that the defendant was found in said lower part of the chimney; that he seemed much excited and enraged, when extricated, and said, 'that he had tried to break open the front door, but failed,—that he cut a hole in the roof, and tried to get in that way, and that he wanted to get in to get some whiskey and potatoes.' It was proved, also, that an effort had been made, on the same night, to break open the front door of said house with a crowbar, and that a hole had been made in the roof, and some of the lathing and plastering knocked off.

"The court charged the jury, that though they might believe the defendant tried to open the door with a crowbar, and tried to get in through the roof, and all the proof on that subject, they could not find the defendant guilty—they could only look to that to ascertain what his intention was; but, if they believed that he afterwards entered the chimney, with the intention to steal, and went so far as within two or three feet of the arch of the chimney, then, although the aperture was too small for him to have passed down to the hearth, yet it was such an entry as would make him guilty of the offense charged. To this charge the defendant objected, and then requested the following written charges: '1. That the facts, as shown by that portion of the evidence relating to the defendant being in the chimney, do not constitute burglary.' '2. That if the jury believe from the evidence that the defendant had at no time gained admission into the

store-house sufficiently to enable him to make an attempt to steal, they must find him not guilty, although he may have become so jammed in the chimney that he could not move in an attempt to get down, and though with an intent afterwards to steal.'—'3. That if the jury believe from the evidence that the defendant did not make such an entry as would enable him to steal, they must find him not guilty.'—'4. That if the evidence shows that the chimney was so constructed, as to prevent a man from entering the house through the same, and did actually prevent him, then the entering such chimney at the top was no burglary.'—'5. That the accused must descend the chimney, and into the house, or in such a manner as to command the house, to make the offense of burglary complete.'—'6. That it is no burglary to enter a chimney, built entirely on the outside of a house, when the house, or a room thereof, cannot be thereby entered.'—'7. That if the jury believe from the evidence that the defendant entered the chimney, but not in such a manner as would enable him to steal, or to commit a felony, they must find him not guilty.'—'8. That the entry of an instrument used only in making a breach into a house, is not such an entry as will constitute burglary.'—'9. That the entry through the roof, with the feet, is not a sufficient entry to constitute burglary, when the foot is only used to make a breach.'—'10. That if they believe the evidence, they must acquit the prisoner.'—'11. That if they believe from the evidence that the defendant got on top of the store-house, and first attempted to enter through the roof, and got his hand or foot, or some weapon or instrument, through the roof, and thereby made a hole therein, merely for the purpose of gaining admission into the store-room, to the floor thereof, with the intent to steal after he got down; and, finding that he could not gain admission in that mode, he thereupon jumped or let himself down at the top of a chimney, appurtenant to, but outside of the store-room, with the purpose of gaining admission to the store-room by that mode, but found it impossible, by reason of the construction and narrowness of the funnel of the chimney, to gain admission in that

mode, and got stuck so fast that he could not get through, nor he got through to the hearth by others, but that the chimney had to be taken down by others to get him out on the outside; and further, that before getting into the chimney, he had prized at the door with a pick-axe, or some other weapon, and almost (but not quite) broken through the door,—that all these facts do not constitute burglary; and that if they believe the above are, in substance, all the facts proved, they must find the defendant not guilty.’ The court refused each one of these charges, and the defendant excepted to the refusal of each.”

GEO. D. HOOPER, for the prisoner, contended, that the court erred in each of the rulings to which an exception was reserved, and particularly in the refusal of the 2d, 6th, and 8th charges asked; and cited the following authorities: *McCall v. The State*, 4 Ala. 643; *Rex v. Roberts*, East’s P. C. 487; *Rex v. Hughes*, *ib.* 491; *Rex v. Rust & Ford*, Russ. & M. 184; *Chitty’s Cr. Law*, 1108; *Wharton’s Cr. Law*, 516.

M. A. BALDWIN, Attorney-General, *contra*, cited 1 Bishop’s *Crim. Law*, § 190; 1 Hawk. P. C. ch. 17, § 6, note 2; 1 Hale’s P. C. 552, note 7; *Commonwealth v. Stephenson*, 8 Pick. 354; *Rex v. Brice*, Russ. & Ry. 450; *Rex v. Bailey*, *ib.* 541; *Rex v. Davis*, *ib.* 499.

R. W. WALKER, J.—There is no error in the record. A chimney is a necessary opening, and needs protection. It is a part of the dwelling-house, and as much closed as the nature of things will admit. Hence, getting into the chimney of a house, with intent to steal, is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house. 1 Hawk. P. C. book 1, ch. 17, § 6, and note; 1 Hale’s P. C. 552, note 7; *Rex v. Brice*, Russ. & Ry. 450; *Rex v. Spriggs*, 1 Moody & Rob. 357; 1 Bishop’s *Cr. L.* § 190; 1 Russell on Crimes, 788; *Wharton’s Cr. Law*, § 1550; 1 Bennett & Head’s *Leading Cr. Cases*, 531.

[2.] The 8th and 9th charges asked were abstract.

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There was no evidence, showing that the defendant made an entry with an instrument used only in making a breach into the house, or that he entered through the roof with his feet, using them only to make a breach. It is very obvious that the conviction was sought and obtained upon the breaking and entering effected by going down the chimney.

Judgment affirmed.

McMANUS vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Manslaughter*.—If death ensues from the intentional application of unlawful force, though there may have been no specific intention to kill, and though the weapon used is not ordinarily calculated to produce death, the perpetrator is guilty of manslaughter in the first degree under the statute of this State. (Code, §§3084-85.) as he would be guilty of voluntary manslaughter at common law. (A. J. WALKER, C. J., *disseating*.)
2. *Relevancy of prisoner's subsequent acts and declarations as evidence*. Under an indictment for murder, it having been shown that the prisoner and the deceased, while on a drunken frolic, had an altercation together, which resulted in a fight between them: that the prisoner struck the deceased with a brick-bat during the fight, and that the latter died from the effects of the blow during the following night,—it is competent for the State to prove, “that about a half-hour after the blow had been given, and after the fight was entirely over, and after the parties had left the place where the fight occurred, the prisoner went to the place where the deceased was, with a pistol in his hand, and said he had come to kill the damned old rascal.”

FROM the Circuit Court of Lowndes.

Tried before the Hon. ROBERT DOUGHERTY.

THE prisoner in this case was indicted in Montgomery

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county, at the January term of the circuit court, 1859, for the murder of Stewart Dillard, "by striking him with a brick-bat." The venue was changed, on the prisoner's application, to Lowndes county, where he was tried at the November term, 1859, and convicted. The facts of the case, as disclosed on the trial, are thus stated in the bill of exceptions:

"The proof showed that, in January, 1859, in Montgomery county, the prisoner and the deceased, while on a drunken frolic, had an altercation together, which resulted in a fight between them; that the prisoner, during the fight, threw at the deceased a piece of brick, as large as one-fourth, or one-half of a brick, which struck the deceased on the side of the head; and that the deceased died during the night of the day on which said fight occurred. Some proof in the cause tended to show, that the blow from said brick-bat produced concussion of the brain, which caused the death of the deceased; while other proof tended slightly to show, that the deceased died from the effects of excessive intoxication. There was some proof tending to show, that the prisoner struck said blow with malice, and under such circumstances as would make the killing murder if death ensued; and there was also proof tending to show, that he struck said blow in the heat of passion, and without malice, and under such circumstances as would make the killing manslaughter if death ensued from said blow. There was some proof, also, tending to show that the blow was struck in self-defense; and other proof tending to show, that said blow was struck in a fight between the parties, mutually and willingly engaged in on equal terms, and was not struck with any intention to kill; and that as struck with the weapon used death would ordinarily be very unlikely to ensue. The State offered to prove, that about a half-hour after the blow had been given, and after the fight was entirely over, and after the parties had left the place where the fight occurred, the prisoner went to the place where the deceased then was, with a pistol in his hand, and said 'that he had come to kill the damned old rascal,' meaning the deceased. The prisoner objected

to the introduction of this evidence; the court overruled his objection, and he excepted.

“The foregoing being, in substance, all the evidence in the case, the court thereupon charged the jury, acceptably to the prisoner, in relation to the law of murder, manslaughter in the first degree, and self-defense. The court also charged the jury, that if they believed from the evidence that said blow caused the death of the deceased, and was not struck in self-defense, but was struck voluntarily, then the lowest grade of offense, of which the prisoner could be found guilty, was manslaughter in the first degree; and to this charge the prisoner, by his counsel, excepted.

“The prisoner asked the court to give the following written charge: ‘If the jury believe from the testimony that the deceased came to his death by a blow inflicted by the prisoner, by the throwing of a piece of brick; and that said blow was inflicted in the progress of a fight between the prisoner and the deceased, willingly commenced and prosecuted; and that after the commencement of the fight, and during its progress, both parties were on equal terms, or equally armed: and that the defendant threw the piece of brick in the fight, not intending to kill; and that the throwing and striking with such a piece of brick, under the circumstances, and in the mode and manner that the proof shows the prisoner did it in this case, would not be likely to produce death,—then the prisoner may be found guilty of involuntary manslaughter.’ The court refused to give this charge, and the prisoner excepted.”

WM. L. YANCEY, and THOS. J. JUDGE, for the prisoner. To constitute manslaughter in the first degree, under our statute, there must be an intention to kill, either actual or implied. If there be no proof of an actual intent, an implied intention may be inferred from the use of a deadly weapon. But, if the weapon used be of such a character as to negative such implied intent, and there be no proof of an actual intent, the party cannot be found guilty of a higher offense than manslaughter in the second

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degree. The charge of the court violated the distinction between the two degrees of manslaughter, and ignored the question of intent as an element of the crime; instructing the jury, in effect, that they must find the prisoner guilty of the first degree of manslaughter, although he did not intend to kill the deceased, although the weapon used was not ordinarily calculated to produce death, and although it was used in a manner very unlikely to produce death. In Oliver's case, (17 Ala. 587,) the weapon used was a gun—an instrument deadly in its nature, likely to produce death, made, indeed, for the express purpose of killing. Hence, the plain distinction between that case and this.

M. A. BALDWIN, Attorney-General, *contra*.—The true distinction between the first and second degrees of manslaughter, under the Code, (§§ 3084–85,) is, that in the first the act producing the death must be voluntarily done, and in the other accidental.—Oliver v. The State, 17 Ala. 601; People v. Rector, 19 Wendell, 592; People v. Clark, 3 Selden, 392; Commonwealth v. Biron, 4 Dallas, 125; Sludstill v. The State, 7 Geo. 14; Beets v. The State, 1 Meigs, 106; Ann v. The State, 11 Humph. 164; Commonwealth v. Gable, 7 Serg. & R. 428; Wharton's Amer. Crim. Law, (4th ed.) §§ 932–33; Archbold's Crim. Law, 211, 226; East's P. C. 232, 241, 255, 257, 266. Involuntary manslaughter is the killing in the performance of an unlawful act, without intent to do bodily harm. Roscoe, 681.

STONE, J.—Manslaughter, at the common law, was divided into voluntary and involuntary. Voluntary manslaughter included all felonious homicides, less heinous than murder, which resulted directly from any unlawful force, aimed at, and applied to the party slain. It was not necessary that the perpetrator should have intended or willed the death of the party. The force being unlawful, and intentionally directed against the deceased, the law pronounced the consummated act—the manslaughter—to be voluntary.—Com. v. Gable, 7 Serg. &

R. 428; *People v. Rector*, 19 Wendell, 592-3; Whar. Am. Cr. Law, § 932; Whar. Am. Law of Hom. 35; Whar. Am. Cr. Law, §§ 978, 971, 976, 987; 2 Bish. Cr. Law, § 659; 4 Black. Com. 191; *Respublica v. Biron* 4 Dallas, 125; *Johnson's case*, 5 Grat. 660; *State v. Jarrott*, 1 Ired. 76. Involuntary manslaughter included all those homicides which were below the grade of murder, and were neither justifiable nor excusable, and which were the accidental result of some unlawful act, less than a felony, not aimed or directed against the person slain. Whar. Amer. Cr. Law, § 933; Whar. Am. Law of Hom. 35; Whar. Am. Cr. Law, 1002; 4 Bla. Com. 192; *Aun v. The State*, 11 Humph. 164.

The framers of our penal code have employed language somewhat different. Their classification is as follows: "§ 3084. Every person convicted of the crime of manslaughter, by voluntarily depriving a human being of life, is guilty of manslaughter in the first degree." "§ 3085. Every person convicted of manslaughter, under any other circumstances than those expressed in the preceding section, is guilty of manslaughter in the second degree."

That it was not the intention of the legislature to reduce any of the common-law murders to the crime of manslaughter, is shown by sections 3080 and 3081 of the Code. Section 3080 defines murder in the first degree, and section 3081 declares, that all other common-law murders, not embraced in section 3080, are murders in the second degree. It is thus shown, that all common-law murders are statutory murders, either in the first or second degree.

While the definition of voluntary manslaughter, as given above, cannot be controverted, it is contended, that our statute has introduced a different rule—namely: that to come within the section which defines manslaughter in the first degree, it is not enough that the force which causes the death be direct and intentional, but that the intention and will shall go further, and contemplate the killing itself; in other words, that the "voluntarily depriving a human being of life," mentioned in the statute,

cannot take place in the absence of a specific intention in the perpetrator to take the life of his victim.

In looking into the statutes of some of the other States, we have found no provision which is expressed in the language of ours. Neither has the precise question presented by this record ever been before this court, in the form in which it is here presented. In the case of *Oliver v. The State*, (17 Ala. 587,) this statute came under review. The 3d charge in that case presented substantially the same question as the one we are now considering, with the exception that, in that case, the homicide was committed with a deadly weapon, while the record in this case informs us that from the blow, "as stricken with the weapon used, death would ordinarily be very unlikely to occur." Considering the evidence recited in this record, in the light of the verdict of the jury upon that evidence, we feel justified in assuming that the death was caused by a piece of brick—as much as a fourth or a half—which was cast by the prisoner at the deceased, and struck the latter on the side of the head, causing concussion of the brain and death.

In *Oliver's* case, it seems to have been conceded, on both sides, that a specific intention to kill was a necessary ingredient in every manslaughter in the first degree. On the one hand, it was contended, that the employment of the deadly weapon, which caused the death in that case, furnished the proof of a specific intention to kill; while this proposition was denied on the other. Some of the expressions in that opinion, viewed abstractly, would incline us to the opinion, that the court recognized a specific intention to kill, as necessary to constitute manslaughter in the first degree. Other expressions, however, are inconsistent with this view, and lead us to the conclusion, that what the court said, tending to the opinion last above noted, must have been in reply to objections and points taken in that case. This, we think, is shown by the fact, apparent in the report of that case, that no distinction seems to have been taken between our statutory manslaughter in the first degree, and voluntary manslaughter at the common law. So far from this being

done, there are many expressions in that opinion, which induce us to believe that the specific intent to kill, there impliedly recognized, would have been held to apply alike to voluntary manslaughter at the common law, and to our statutory manslaughter in the first degree.

A further support to our view, stated above, is found in the fact, that, in Oliver's case, there are evidences that this court entertained the opinion, that the prisoner might be guilty of a higher grade of homicide than manslaughter in the first degree.

We do not think Oliver's case ought to be recognized as an authority on the question we are considering; because in that case the record did not raise the point.

We confess ourselves unable to distinguish between *voluntary manslaughter*, and manslaughter by *voluntarily depriving a human being of life*. Manslaughter is the unlawful killing of a human being, without malice. To kill is to deprive of life. If, then, instead of voluntary manslaughter, we substitute its synonym and definition, we have *the unlawful and voluntary depriving a human being of life, without malice*. This is, in substance, and almost in words, what our legislation declares shall be manslaughter in the first degree.

The arguments drawn from the judicial construction, in other States, of the word *willful*, as employed in statutory murder, can exert no influence in the definition of voluntary manslaughter. *Willful* is not the synonym of voluntary. In truth, they express no distinct idea which is common to both. The former is a word of much greater strength than the latter. *Willful*, in this connection, denotes "governed by the will; without yielding to reason; obstinate; stubborn; perverse; inflexible." Voluntary, in this connection, means "willing; acting with willingness." It is the antithesis of involuntary. Voluntary manslaughter covers the whole ground of manslaughter, not occupied by involuntary manslaughter, which latter includes homicides that are the accidental result of some unlawful act, less than a felony. It is a perversion of language to say, that a force which is direct and unlawful, and which is intentionally aimed at a

particular person, and causes his death, or that the homicide thus brought about, is involuntary.

Construing the charges given and refused in this case, in the light of the testimony, we think the court did not err.

[2.] The circuit court did not err in admitting evidence, against the prisoner, of his acts, declarations and conduct, when he returned, a half-hour after the blow was stricken, to the scene of the engagement. The indictment was for murder, and such declarations and menacing acts tended to show the hostile feelings of the accused towards the deceased. Armed as he was with a deadly weapon, and threatening to take the life of the man he had, just before, assaulted with great violence, this, in the absence of sufficient provocation, was a circumstance for the jury to weigh, in determining whether he had not acted with a formed design to take life. It tended to repel the idea, that the fatal blow had been struck in a sudden transport of passion—pending the *furor brevis*—which, in a proper case, will mitigate homicide to manslaughter.

It is to be lamented deeply, that death by violence has, in this State, grown to be of such alarming frequency. Scarcely a week passes that does not add its victim to the long and frightful list of homicides. The fault is not in the law. While its provisions are humane and just, they are yet sufficiently strict, if duly administered, to punish crime and restrain the lawless. The fault lies in a loose, and falsely merciful administration of the law. Acquittals, in prosecutions for homicide, have become so frequent, that the criminal law has lost much of its terror. In this way, misdirected sympathy for one malefactor has, we fear, nerved and prompted the wicked to the destruction of many valuable lives. A just and humane appreciation of the rights and perils of the accused, should at all times pervade the jury-box; yet our sympathy and solicitude should take a wider range. The lives of others—the very repose and security of society, rest on a wise system of penal laws, faithfully, yet humanely administered.

A false opinion has, we fear, obtained extensive credence, that notions of chivalry, or personal prowess, can lawfully enter into individual quarrels and combats. The humane doctrine of the common law, which, for the protection of human life, required the citizen to decline a combat, and to abstain from the shedding of blood, whenever he could do so, without endangering his person in the one case, and his life in the other, seems, in a great degree, to have been lost sight of.

We have discovered no disinclination to administer the law in its purity, when the killing was by stealth, by lying in wait, by poison, or for the sake of gain. When, however, life has been taken boldly, during a personal engagement, or in resentment of an assault or gross insult recently given, it is difficult to obtain a faithful administration of the law. Voluntary manslaughter, and even the most atrocious murder, may be, and frequently is committed, while the parties are engaged in personal combat.

Much of the waste and destruction of life, under which society is suffering, grows out of the pernicious practice, too prevalent among our citizens, even in the peaceful pursuits of life, of wearing deadly weapons upon their persons. Such deadly weapons are readily drawn, and fatally employed, in resentment of injuries and insults of the most trivial character. While the law secures the right to all to employ deadly weapons, even to the fatal result, in protection of life, or to save one's person from grievous bodily harm, as the law understands that term, we may well ask, why, in a peaceful community, do citizens wear arms, who have no just grounds to apprehend danger to their lives, or those *grievous personal injuries*, which will excuse a resort to deadly weapons? The law views as equally sacred the life of every citizen, no matter how humble or worthless he may be; and cannot hold him guiltless, who takes vengeance into his own hands, except there be a well grounded apprehension, at the time, of imminent danger to life or member, from which there is no other reasonable way of escape. An insult, or an assault, or an assault and battery, which does not endanger

life or member, furnishes no excuse for taking life. If the provocation be personal violence, which does not endanger life or member, and immediately afterwards, influenced and maddened by the injury, and without any formed design, the party stricken slay the other, and there be no evidence of previous malice, or intention to kill, then the law, out of respect to human infirmity, mitigates the offense to manslaughter. If, however, there was a previous specific intent to kill, and the assault was provoked or taken advantage of as a pretext for taking life, and such intention be carried out, this is murder. So, if a party be armed with a deadly weapon, or have such weapon within his reach, and have formed the general purpose to employ such weapon upon an exigency, such as an assault and battery upon him, not endangering life or member, and do so employ it, and thereby take life, pursuant to such previous design—this is a species of universal malice, and constitutes murder.

In the case of *Rex v. Thomas*, (7 C. & P. 817,) Baron Parker, in charging the jury, said: "If you find that, before the stroke is given, there is a determination to punish any man who gives a blow with such an instrument as the one which the prisoner used," [a sword cane].—"because, if you are satisfied that, before the blow was given, the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving of such a wound to the passion of anger excited by that blow; for no man who was under proper feelings—none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument."—See, also, 2 Bishop's Criminal Law, section 643.

The law is so framed as to secure personal immunity to every citizen, and affords ample redress for all his injuries. Cases may arise, when, on provocation which falls below self-defense, life is taken, or attempted, by one who habitually wears arms, and when the proof fails to show just grounds to apprehend an attack. How far these circumstances should be considered in adjusting the degree of the offense, it is not proper we should here declare. We

leave this subject to be determined, when the subject comes directly before us.

Judgment affirmed.

A. J. WALKER, C. J., *dissenting*.

BLACKMAN vs. THE STATE.

[INDICTMENT FOR LIVING IN ADULTERY.]

1. *Relevancy of evidence to prove adultery.*—Under an indictment against a married man, for living in adultery with an unmarried woman, it having been proved that the defendant frequently visited, by night, the house in which the female lived, and was seen lying in bed with her in her chamber, proof of the woman's general reputation for a want of chastity is relevant and admissible for the prosecution.
2. *Mode of objecting to evidence admissible against one defendant only.*—When two persons are jointly indicted and tried, and evidence is offered which is admissible against one of them only, if the other wishes to avoid its effect as evidence against him, he must ask an instruction to the jury limiting its effect, instead of moving to exclude it altogether.
3. *Charge to jury on weight of evidence as compared with evidence in reported case.*—Under an indictment charging a man and a woman with living together in adultery, the defendants' counsel read to the jury the reported case of *Mosser v. Mosser*, (29 Ala. 313,) in which the evidence was held insufficient to establish the fact of adultery; and asked the court to charge the jury, "that, unless they believed the facts of the case at bar were stronger and more conclusive of guilt than the facts in that case, the defendant ought to be acquitted,"—*held*, that the charge was properly refused.

FROM the Circuit Court of Dale.

Tried before the Hon. JOHN GILL SHORTER.

THE indictment in this case charged, "that Joseph Blackman, a man, and Elizabeth Mound, a woman, did live together in adultery or fornication." The defendants

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pleaded not guilty, and were tried together; and during the trial reserved the following bill of exceptions: "The State proved divers facts and circumstances, conducing to establish an adulterous intercourse between the defendants within the period covered by the indictment; among which were frequent visits by said Blackman, at night, to the house where said Elizabeth lived, with her father, sister and brother; also, that he was seen with her in her bed-room, and lying with her on the same bed at night. Said Blackman, it was shown, was a married man, and lived within a mile, and was on terms of intimacy with the said family. The State then offered to prove, that before the finding of the indictment in this case, and at the time of Blackman's visits to said house, the general reputation of said Elizabeth was that of an unchaste woman. To this evidence the defendants objected, neither of them having offered any evidence in respect to character; but the court overruled their objection, and they excepted. In the course of the argument to the jury, the defendants' counsel read the report of the case of *Mosser v. Mosser*, (20 Ala. 313,) including the opinion of the court and all the facts; and asked the court to charge the jury, that the case of *Mosser v. Mosser* was law in Alabama, and that unless they believed from the evidence that the facts in the case at bar were stronger and more conclusive of guilt than the facts in that case, the defendants ought to be acquitted. This charge the court refused to give, and the defendants excepted."

PUGH & BULLOCK, for the prisoners, cited Roscoe's Crim. Ev. 98; Lawson & Swinney v. The State, 20 Ala. 77.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—Had the defendant Blackman been alone upon trial, we see no reason to doubt that the evidence which was objected to would have been admissible. That a married man pays frequent visits, at night, to the house of a female, and is seen with her in her bed-room, and lying with her on the same bed at night, are

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circumstances, which, of themselves, are well calculated "to lead the guarded discretion of a reasonable and just man to the conclusion" that the parties have been guilty of adultery. The presumption that the criminal act had been committed would be strengthened by proof that the general reputation of the female was that of a woman who was not disinclined to yield to the temptations and improve the opportunities established by such evidence. See *Astley v. Astley*, 1 Hagg. Eccl. R. 719.

[2.] Where two defendants are on trial, evidence which is admissible against either of them is competent evidence in the case; and if the other defendant desires to avoid the effect which it may have upon him, he must ask an instruction from the court for that purpose.—*Falkner v. Leith*, 15 Ala.; *Palmer v. Severance*, 9 Ala. 756; *Goodman v. Mitchell*, 30 Ala. 482. If the female defendant desired to relieve herself from the influence of the evidence which was offered as to her general reputation, she should have asked the court for an instruction limiting its effect.

[3.] There was no error in the refusal of the charge asked.

Judgment affirmed.

PATTERSON vs. THE STATE.

[INDICTMENT FOR RETAILING.]

1. *Selling liquor drunk on or about premises.*—*Held*, on the authority of *Easterling's case*, (30 Ala. 46,) *Downman's case*, (14 Ala. 243,) and *Brown's case*, (31 Ala. 353,) that the court properly refused to instruct the jury, at the request of the defendant, "that if they believed from the evidence that the liquor was drunk in the State of Tennessee," or, "that it was carried upon land belonging to another person, and over which the defendant had no control, and drunk there,—they must find the defendant not guilty."

FROM the Circuit Court of Lauderdale.

Tried before the Hon. WM. S. MUDD.

THE bill of exceptions in this case is as follows:

"On the trial of this case, Hugh R. Reynolds, a witness for the State, testified, that he bought a quart of whiskey from the defendant, at the time mentioned in the indictment, in the county of Lauderdale; and that he took it, in a quart cup belonging to the defendant, about fifty yards from the grocery, across the State line into Tennessee, and upon the land of a man by the name of Adams, where he and others drank it. It was proved, also, that the defendant kept a grocery, or a house where he sold spirituous liquors; and that said grocery was located in said county of Lauderdale, Alabama, near the line of the State of Tennessee. Upon this state of facts, the defendant asked the court to instruct the jury—1st, that if they believed from the evidence that the liquor was drunk in the State of Tennessee, they must find the defendant not guilty; and, 2dly, that if they believed, from the evidence that the liquor was carried upon land belonging to another person, and over which the defendant had no control, and drunk there, they must find the defendant not guilty. The court refused to give either of these charges, and the defendant excepted to their refusal."

E. A. O'NEAL, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—It is clear that, under section 1058 of the Code, neither the fact that the liquor was drunk in the State of Tennessee, nor that the drinking took place on lands over which the defendant had no control, would, as matter of law, require the acquittal of the accused. See *Easterling v. The State*, 30 Ala. 46; *Downman v. The State*, 14 Ala. 243; *Brown v. The State*, 31 Ala. 353.

Judgment of the circuit court affirmed.

EX PARTE NALL.

[MOTION FOR MANDAMUS TO STRIKE CAUSE FROM TRIAL DOCKET.]

1. *Admissibility of parol evidence, in aid of record, to identify pending cause.*—On motion to strike from the trial docket a case in which a new trial had been granted at the last preceding term, the marginal statement of the parties' names, both in the entry of the motion on the motion docket, and in the entry of the order on the minutes, being erroneous, parol evidence is admissible to identify the case and correct the mistake.

APPLICATION for a *mandamus* to the circuit court of Pike, Hon. JOHN GILL SHORTER presiding, to compel that court to strike from the trial docket a cause in which Jefferson Darby and others were plaintiffs, and the petitioner, James P. Nall, was defendant. On the motion in the circuit court, as appears from the bill of exceptions, it was shown that, at the September term, 1859, a trial was had in the cause, which resulted in a verdict for the defendant; that a new trial was granted, at the same term, on the plaintiffs' application; and that in the entry of the motion for a new trial on the motion docket, and of the order on the minutes granting the new trial, the cause was entitled, "Jefferson Darby, *et al.* vs. M. M. Nall, and J. P. Nall." On the motion to strike the cause from the docket, the defendant objected to the admission of the motion docket and minute entry as evidence, because the entries therein related to another and a different case; but the court overruled his objections, and permitted the plaintiffs to prove, by parol evidence, that said entries had reference to the case in which James P. Nall was the sole defendant, and that there had been no case in court in which he and M. M. Nall had been joint defendants. The defendant reserved exceptions to these rulings of the circuit court, and he now makes them the basis of his application to this court.

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C. CUNNINGHAM, for the motion, cited *Lewis v. Lewis*, 25 Ala. 316; *Reid v. Brasher*, 7 Porter, 448; *Hudson v. Hudson*, 20 Ala. 364.

A. J. WALKER, C. J.—The *mandamus* in this case is sought upon the ground, that the grant of a new trial, as stated in the entry upon the minutes, is shown by the marginal description of the parties to be applicable to a case in which there was another defendant besides the proper defendant in the cause. The court below held, that extrinsic evidence was admissible, to show the applicability of the order granting a new trial to the case. In so ruling, we think the court committed no error. We think that, from necessity, the connection of the order with the case may be shown; and that being shown, the error in the description of the case will stand corrected by the other parts of the record.—*Smith v. Redus*, 9 Ala. 99; *Savage & Darrington v. Walshe*, 26 Ala. 633. The decision in *Smith v. Redus*, *supra*, is precisely in point.—See Code, §§ 2403, 2404.

Motion refused.

EX PARTE CARROLL & ADCOCK.

[APPLICATION FOR BAIL.]

1. *Practice on applications for bail*.—When an application for bail is made to a circuit judge, and is by him refused, the party may have the evidence set out in a bill of exceptions, (Code, § 3673,) and make application thereon to the supreme court for bail: but he cannot make a second application to a circuit judge, founded on cumulative evidence discovered since his first application: nor can he bring the first application before the supreme court for review, by making the proceedings then had a part of his second application, and reserving a bill of exceptions to the refusal of the second application.

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2. *Right of bail on account of continuances.*—The right to bail in capital cases, on account of continuances by the State, (Code, §§ 3671-72.) is confined to cases which have been twice continued “for the testimony of absent witnesses.”

APPLICATION for bail by Edward Carroll and William Adeock, who were confined in the county jail of Barbour, under an indictment for the murder of one William Drury, which was found at the fall term, 1857, of the circuit court of Barbour. The bill of exceptions, on which the application is founded, with the accompanying transcript, shows that the petitioners, on the 14th May, 1860, made an application for bail, on *habeas corpus*, to the Hon. JOHN GILL SHORTER; that on this application they offered in evidence the written testimony which had been taken down on their preliminary examination, the evidence which had been adduced on a similar application for bail before the same judge, in May, 1858, “and additional evidence discovered since said former application, explanatory of the evidence then taken, and contradictory of some of the material evidence for the State, being cumulative of the evidence for the prisoners on the former hearing,” together with a transcript from the records of the circuit court of Henry county, which is hereinafter more particularly noticed; that the circuit judge refused to consider any of this evidence, except the transcript, and held it insufficient to show that the petitioners were entitled to bail; and that the petitioners excepted to his ruling and decision. The transcript from the circuit court of Henry shows, that the trial of the prisoners was removed to that county, though they were remanded to the county jail of Barbour for safe-keeping; and that the case was there continued by the State at four successive terms,—twice on account of defects in the venire or its service, once for want of time, and once on account of the sickness of the presiding judge.

L. L. CATO, for the prisoners.

E. C. BULLOCK, and JEFF. BUFORD, *contra*.

STONE, J.—Section 3673 of the Code declares, that

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"If application for bail be made to a circuit court, or circuit judge, or chancellor, and denied, no subsequent application can be made; but the evidence in such case may be set out on exceptions, and the application made thereon to the supreme court." The necessity for such a rule as this is strongly set forth in the able opinion of Black, J., in the celebrated *Passmore Williamson* case. His language is, "Can it be possible, that the law and the courts are so completely under the control of their natural enemies, that every class of offenders against the Union or the State, except traitors and felons, may be brought before us as often as they please, though we know beforehand, by their own admissions, that we cannot help but remand them immediately? If these questions must be answered in the affirmative, then we are compelled, against our will, and contrary to our convictions of duty, to wage a constant warfare against the federal tribunals, by firing off writs of *habeas corpus* upon them all the time. The punitive justice of the State would suffer still more seriously. The half of the Western Penitentiary would be before us at Philadelphia, and a similar proportion from Cherry Hill and Moyamensing would attend our sittings at Pittsburgh. To remand them would do very little good; for a new set of writs would bring them all back again. A sentence to solitary confinement, would be a sentence that the convict should travel for a limited term up and down the State, in company with the officers who might have him in charge. By the same means, the inmates of the lunatic asylum might be temporarily enlarged, much to their own detriment; and every soldier or seaman in the service of the country could compel their commanders to bring them before the court six times a week."—26 Penn. State Rep. 9.

Under the section of the Code above copied, we hold, that when one who is restrained of his liberty, has gone on *habeas corpus* before a circuit court, circuit judge, or chancellor, and has had a trial on evidence, with a view to his enlargement on bail, and his application has been overruled, he cannot again claim a hearing before either of these tribunals, on evidence; but his only remedy in

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such case is, to have the evidence set out *on exceptions*, and make his application thereon to this court.—*Ex parte* Robinson, 6 McL. 355; *Ex parte* Wells, 18 How. (U. S.) 307; State, *ex rel.* Malone, Sneed, 413; Matter of Da Costa, 1 Park. Cr. Cases, 129; People v. Martin, *ib.* 187; Matter of Collier, 6 Ohio State (N. S.) 55; Storm v. State, 4 Mo. 614.

The petitioners in this case had a hearing on evidence, before Hon. John Gill Shorter, before whom they were carried on writ of *habeas corpus*. They were refused bail, and took no bill of exceptions. More than two years afterwards, they again went before Judge Shorter on *habeas corpus*, and sought again to introduce evidence on the matter of their right to bail. The circuit judge overruled their application to introduce new evidence, and remanded them to prison. They excepted to his ruling, and took a bill of exceptions, which brings before us, not only the proceedings on the second trial, but the evidence and proceedings on the first trial also. We hold, that the bill of exceptions—sealed at the time it was—does not bring before us the evidence and judgment on the first trial, for any other purpose than to show that a trial had been had on evidence, before the circuit judge, on *habeas corpus* to obtain bail. We hold, also, that the circuit judge rightly refused to hear evidence on the second trial. Code, §§ 2353, 2354, 3673.

The record from Henry circuit court does not show a state of case, which entitled the petitioners to bail *as a matter of right*.—Code, §§ 3671–2.

The prayer of the petitioners is refused.

DANE vs. MAYOR &c. OF MOBILE.

[PROCEEDINGS FOR VIOLATION OF MUNICIPAL ORDINANCE.]

1. *Construction of municipal ordinance requiring public carriages to be lighted when on duty by night.*—Under the ordinance of the city of Mobile, imposing a fine “on the owner or driver” of a public carriage, hack or cab, for a failure to have the lamps of his vehicle lighted when on duty by night, (Municipal Laws of Mobile, 105, § 86,) it is no defense to the owner, that he was not present, and had no knowledge of the alleged violation of the law by his negro driver.
2. *Practice on error in appeal or certiorari cases.*—In appeal and *certiorari* cases, which, when the amount in controversy is less than \$20, are tried by the court without the intervention of a jury. (Code, § 2369,) the judgment of the circuit court will not be reversed on error, unless its decision on the facts is shown to be manifestly wrong.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE appellant in this case was prosecuted, before the mayor of the city of Mobile, for an alleged violation of the municipal ordinance which requires public carriages to be lighted when on duty by night; and was fined \$10. He removed the case, by *certiorari*, to the circuit court, where, as the bill of exceptions shows, the following evidence was adduced: “The plaintiff introduced as a witness one M. D. Cleveland, a police officer of the city, who testified, that his brother and another person, who were not policemen, saw the defendant’s cab standing in the street in front of a house, with its lamps not lighted; that they took the cab, horse and negro driver in charge, and drove a short distance to his (witness’) house; that he then ordered the driver, who was a slave, to light his lamps, which he did; and that he then got into the cab, drove to the city guard-house, and reported the defendant. The defendant then introduced as a witness one Busbee,

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who testified, that on the night mentioned by said Cleveland, having occasion to go to a remote part of the city, he employed the defendant's cab; that both of the lamps of said cab were then burning; that after riding within about one hundred yards of the place where he was going, he ordered the driver to stop, so that he might light his cigar by the lamp; that while he was endeavoring to light his cigar, both lamps were blown out by a strong wind then prevailing; that he then ordered the negro to drive on to his destination, as he was in a hurry; that he got out of the cab on arriving at the place where he was to stop, and told the driver to wait for him a few minutes, until he transacted some business with the gentleman whom he had called to see; that the driver was furnished with matches, and that it was his (witness') fault alone that the lamps were blown out. The city ordinance was also read in evidence, as published in the Municipal Laws of Mobile, pages 105-6. This being all the evidence, the defendant asked the court for judgment in his favor; which the court declined to grant, and gave judgment for the plaintiff, for \$10; and to this ruling of the court the defendant excepted."

OVERALL & MOULTON, for appellant.

CHAMBERLAIN & HALL, *contra*.

R. W. WALKER, J.—By an ordinance of the city of Mobile it is provided, that the lamps of every carriage, hack, or cab kept for hire, "shall be lighted every night, moonlight or dark, at dusk, and continue solighted, while in the streets or elsewhere, on hire; under penalty of not less than five, nor more than fifty dollars, to be imposed on the owner or driver."—Municipal Laws of Mobile, 105, § 86. The effect of this ordinance is to make the owner of a cab liable for the failure of his driver to keep the lamps lighted. Consequently, it is no answer to this proceeding, that Dane was not present, and had no knowledge of the violation of law complained of.

[2.] Whether the driver had violated the ordinance in question, was a question of fact, to be tried by the court,

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without the intervention of a jury.—Code, § 2369. In this class of cases, we think the proper practice is, not to reverse the judgment, unless the decision of the court below on the question of fact is manifestly wrong. As we cannot say that this is so in the present case, the judgment of the circuit court is affirmed.

EX PARTE CLEVELAND.

[APPLICATION FOR HABEAS CORPUS BY PARTY ARRESTED UNDER CA. SA.]

1. *Practice in application for habeas corpus.*—When a party who is in custody has sued out a *habeas corpus* before a circuit judge, who refuses to discharge him, he may then make application to the supreme court, to revise the action of the circuit judge; but the facts on which the action of the circuit court was based must be brought to the notice of the supreme court.
2. *Writ of ca. sa.*—A writ of *ca. sa.* is not confined in its operation to the county of the defendant's residence; nor is it necessary that the clerk endorse on it that the sheriff hold the defendant to bail in double the sum sworn to be due.

APPLICATION for *habeas corpus* by C. H. Cleveland, who was arrested by the sheriff of Mobile, on the 21st May, 1860, under a *capias ad satisfaciendum* issued by the clerk of the circuit court of Russell; and who thereupon sued out a *habeas corpus* before Hon. C. W. RAPIER, who refused to discharge him. In the petitioner's application to this court it is alleged, that he was a resident citizen of Mobile county at the time of his arrest; but the transcript, which is annexed to the petition, does not show, by bill of exceptions or otherwise, that that fact was proved on the application before Judge Rapier.

CHAMBERLAIN & HALL, for the petitioner.

BEN LANE POSEY, *contra*.

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STONE, J.—The petitioner in this case went before Hon. C. W. Rapier, on writ of *habeas corpus*, sued out by petitioner to obtain his discharge from arrest under a *capias ad satisfaciendum*. Judge Rapier refused to discharge him, and remanded him to the custody of the sheriff. Mr. Cleveland now presents his petition to this court, and asks us to revise the action of Judge Rapier. See *Ex parte Burnett*, 30 Ala. 461.

The facts which were made to appear before Judge Rapier, are not brought to our notice; and hence we are not able to say on what facts he based his decision. This, of itself, is enough to require us to withhold the writ. We cannot say that he erred, unless we know upon what facts he pronounced judgment. If the argument be sound, that a defendant cannot be arrested on *ca. sa.* issued from a county other than that of his residence; still, we do not know that it was made to appear to Judge Rapier that Mr. Cleveland did not reside in Russell county.

We do not think, however, that a writ of *capias ad satisfaciendum* is confined in its operation, like a bail writ, to the county of the defendant's residence. The statute does not restrict it,—and we have no authority to interpolate such provision. Nor can it be necessary that the clerk shall endorse on the *ca. sa.* “that the sheriff hold the defendant to bail, in double the sum sworn to be due.” The writ of *ca. sa.* shows both the amount due, and the order to arrest the defendant.—Code, §§ 2175, 2422, and form.

The writ of *habeas corpus* is refused.

MCQUEEN vs. IVEY.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Adverse possession by purchaser, under color of title.*—If a purchaser enters into the possession of land under a vendor's bond, conditioned to make titles when the purchase-money is paid, he cannot, so long as the purchase-money remains unpaid, set up adverse possession against the vendor under color of title; but, after the purchase-money has been paid in compliance with the terms of the contract, such a bond is color of title, and subsequent possession under it for a sufficient length of time will bar the legal title.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by William E. A. McQueen, against Samuel Ivey, to recover the possession of a certain tract of land described in the complaint, together with damages for its detention; and was commenced on the 20th August, 1857. The defendant pleaded not guilty, and the statute of limitations of ten years. The evidence adduced on the trial, and the rulings of the court thereon, are thus stated in the bill of exceptions:

"The plaintiff proved, that Abram Adams purchased the lands now sued for from the United States in 1832, obtained patents therefor in 1835, sold said lands to one Owens in 1833, and gave him a bond to make titles on the payment of one-half of the purchase-money,—the other half being paid in cash; that said Owens went into the possession of said lands under said bond, held said lands for some time, sold them in 1835 to one J. L. Williamson, and transferred said bond to him by delivery; that said Williamson went into possession of said lands under said bond, and so remained in possession until the 1st January, 1844; that in March, 1854, said Williamson sold said lands to the plaintiff in this suit, and transferred said title-bond to him; that said Adams made a deed for

said lands to plaintiff in 1855, and took up said title-bond; that the defendant was in possession of said lands at and before the commencement of this suit, and that the annual rent thereof was worth \$——.

“The defendant then introduced evidence, tending to show that, in 1840, one Knight obtained a judgment against said J. L. Williamson, and had execution issued thereon; that said lands were levied on, under execution on said judgment, in October, 1843, and were sold by the sheriff on the 1st January, 1844; that the defendant became the purchaser at the sale, and received the sheriff's deed; that shortly after his said purchase, to wit, in January, 1844, the defendant authorized the erection of a blacksmith's shop on said lands, which was kept up about a year, but was then burned down, and was not rebuilt; that the defendant paid the taxes assessed on said lands, from time to time, from the time of his said purchase to the present; that he leased a part of said lands, a short time after his said purchase, to some persons in the neighborhood, to build a church on; that the church was built thereon, and was occupied by the members, under said lease, from that time to the commencement of this suit; that there was a race-track on said lands at the time of the defendant's said purchase; that this track was used by the defendant for more than ten years before the commencement of this suit, and, by his authority, was occasionally used by other persons; that the defendant, at various times after his said purchase, warned trespassers off said land, and claimed them in good faith as his own, under the title acquired as before stated; and that said claim was open, public, notorious, undisturbed, and continued from the time of the defendant's said purchase until the commencement of this suit. But the evidence showed, also, that said Adams had removed to Mississippi before the said sheriff's sale, had resided there ever since his removal, and was residing there at the time of the execution of his said deed to the plaintiff; and there was no evidence showing that, at or before the making of his said deed, he had any notice of the defendant's claim to said lands. The testimony

showed, also, that the balance of the purchase-money was paid, in 1836, to said Adams' brother and agent, who was authorized to receive the same, but who never paid the same to said Adams; but said title-bond was never delivered to said Adams, until delivered by the plaintiff in this suit, as above stated.

"This being all the evidence in the cause, the court charged the jury, that the plaintiff was not entitled to recover, if they found the foregoing facts to be true; to which charge the plaintiff excepted, and, in consequence of said charge, took a nonsuit."

The charge of the court is now assigned as error.

WATTS, JUDGE & JACKSON, for appellant.—1. Possession under an executory contract of purchase is not adverse to the owner of the legal title, unless there is an open assertion of title notoriously made, and notice thereof brought home to the holder of the legal title; and the statute of limitations does not commence to run in favor of the person in possession, until both these things concur.—*Sellers & Cook v. Hayes*, 17 Ala. 749; *Seabury v. Stewart & Easton*, 22 Ala. 217; *Benje v. Creagh's Adm'r*, 21 Ala. 151; *Knight v. Bell*, 22 Ala. 198; *Herbert v. Hanrick*, 16 Ala. 581; *Harrison v. Pool*, 16 Ala. 167.

2. It is a universal rule, that the possession of a trustee never becomes adverse, so as to prevent a transfer by the *cestui que trust*, or to make the statute of limitations begin to run, until he openly and notoriously asserts title in himself, and brings notice of such assertion home to the *cestui que trust*.—*Kane v. Bloodgood*, 7 Johns. Ch. Our own court has extended this principle to *quasi* trusts. *Boyd v. Beck*, 29 Ala. 704; *Herbert v. Hanrick*, *supra*; and other cases above cited.

3. If the defendant had bought the land from Knight, Williamson, or any other person holding under a title-bond from Adams, his possession could never have become adverse to Adams, until accompanied with public and notorious assertion of title, and knowledge thereof brought home to Adams; and the fact that he purchased at sheriff's sale, cannot affect the principle. If Williamson were the

defendant, he could not successfully resist a recovery on the plaintiff's title; and Ivey, claiming under him, can occupy no better position. At the time of the defendant's purchase, Williamson had only an equitable title, which could not be sold under execution at law.—*Elmore v. Harris*, 13 Ala. 360. The defendant was bound to know that Williamson held under a bond for titles.—*McDougald v. Scroggins*, 8 Ala. 385.

4. The question of adverse possession ought to have been left to the jury.—*Herbert v. Haurick*, *supra*.

BAINES & NESMITH, with R. M. WILLIAMSON, *contra*.

1. Where a vendor of land gives a bond for titles, and afterwards receives payment of the purchase-money, the subsequent possession of the purchaser is adverse to him, and, if continued during the statutory period, will bar the legal title.—*Ellison v. Cathcart*, 1 McMull. 7; *Bank v. Smyers*, 2 Strob. Law, 28; *Van Blarcom v. Kip*, 2 Dutch. (N. Y.) 361; *Ray v. Goodman*, 1 Sneed, 586; *Brown v. King*, 5 Metcalf, 173; *Benson v. Stewart*, 30 Miss. 57; *Angell on Limitations*, §§ 405–6, 471; *Sellers & Cook v. Hayes*, 17 Ala. 752.

2. The plaintiff's deed, having been made pending the defendant's adverse possession, is champertous and void. *Harvey v. Carlisle*, 23 Ala. 635; *Abernathy v. Boazman*, 24 Ala. 189. The case of *Sellers & Cook v. Hayes*, *supra*, is not law on this point. The court, in that case, entirely overlooked the fact that the purchase-money had been paid, and placed their decision on the ground that the purchaser held the land in trust for the *unpaid* purchase-money. The case of *Seabury v. Stewart & Easton*, 22 Ala. 217, asserts the true doctrine.

3. There can be no doubt, under the facts proved, that the defendant had possession of the land. In countries where all the land is enclosed, actual enclosure and occupation are necessary to constitute possession; but in this country, the exercise of visible and notorious acts of ownership is sufficient. The fact that a party is claiming under color of title, calls for the application of a more liberal inference in favor of his possession.—*Spear v. Ralph*,

14 Vermont, 404; Ewing v. Burnett, 11 Peters, 53; Draper v. Shoot, 25 Missouri, 203.

R. W. WALKER, J.—Where a party enters into the possession of land under a vendor's bond, conditioned to make titles when the purchase-money is paid, his possession, so long as the purchase-money remains unpaid, is held to be in subordination to the title of the vendor; and in an action by the latter for the recovery of the land, the vendee cannot claim the protection of the statute of limitations, on the ground of adverse possession under color of title. The very instrument under which the party enters and holds, shows upon its face that he cannot claim the land as his until he has paid the purchase-money.—Seabury v. Stewart & Easton, 22 Ala. 207; Bank v. Smyers, 2 Strob. Law, 28; Benson v. Stewart, 30 Miss. 57; Paxson v. Bailey, 17 Geo. 600; Jackson v. Camp, 1 Cowen, 605; Secrest v. McKennan, 6 Rich. Eq. 72; Woods v. Dille, 11 Ohio, 453; Stamper v. Griffin, 20 Geo. 321.

But, when the vendee has complied with the terms of the contract on his part, by paying the purchase-money, such a bond is color of title; and if he thereafter remain in possession, claiming the land as his own, for the period prescribed by the statute of limitations, the legal title will be barred.—Jackson v. Foster, 12 Johns. 490; La Frombois v. Jackson, 8 Cowen, 597; Briggs v. Prosser, 14 Wend. 227; Fosgate v. Herkimer Co., 12 Barb. 352; Bank v. Smyers, 2 Strob. Law, 28; Ellison v. Cathcart, 1 McMull. 7; Brown v. King, 5 Mete. 173; Barton v. Morris, 15 Ohio, 408; Drew v. Towle, 10 Foster, 531; Stamper v. Griffin, 12 Geo. 458; Benson v. Stewart, 30 Miss. 58; Lander v. Ronnsaville, 12 Texas, 195; Angell on Lim. §§ 405-6.

Sellers & Cook v. Hayes, 17 Ala. 749, is not in conflict with the doctrine last stated. In that case, the court did hold, that the possession of the vendee, under a bond for titles, will not prevent the lien of a judgment, rendered against the vendor during the continuance of such possession, from attaching to the land; and this was so held,

although it was shown that the vendee in that case had paid the purchase-money at the time of the purchase. Whether this fact was allowed its due weight, we do not now inquire. On examining the opinion of the court, it will be seen, that it is placed upon an assumed distinction, between an adverse possession that will give title under the statute of limitations, and such adverse possession as will enable the tenant to set up title in himself or another, or would prevent him who had the title from transferring it; and it is expressly said, that if no suit had been brought against the vendee, or those claiming under him, until twenty years from the time he took possession, the statute of limitations would have protected him from a recovery.—See page 752. This case is, therefore, not an authority against the rule we have laid down above.

It results, that there was no error in the charge of the court.

Judgment affirmed.

GRAND LODGE OF ALABAMA vs. WADDILL.

1. *Authority of corporation to lend money.*—The charter of the grand lodge of free-masons of Alabama (Toulmin's Digest, 582-3) confers on said corporation no power to lend money.
2. *When action lies for money had and received.*—If a corporation lends money, without authority under its charter, and takes a promissory note to secure the repayment, it cannot recover under the common money counts.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama, and

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its Masonic Jurisdiction," against William Waddill, Jr., Abner Jones, George P. Blevins, John M. Strong, and Wesley Plattenburg; and was founded on the defendants' promissory note, of which the following is a copy :

"Selma, March 8th, 1851.

"\$2,753 75. Twelve months after date, we promise to pay to the Most Worshipful Grand Lodge of Ancient Free-masons of Alabama and its Masonic Jurisdiction the sum of two thousand seven hundred and fifty-three 75-100 dollars, for money loaned to us by the trustees of said grand lodge, in that behalf duly appointed; and upon which we bind ourselves to pay interest, at the rate of seven per cent. *per annum* from date."

(Signed by each of the defendants.)

The action was commenced on the 10th September, 1856. The complaint contained a count on the note, and the common count for money loaned. The defendants pleaded the general issue, "in short by consent, with leave to give in evidence any special matter of defense." On the trial, as the bill of exceptions shows, the plaintiff read in evidence the note on which the suit was founded, and its own act of incorporation, as found in Toulmin's Digest, (pages 582-3,) which is in the following words :

"An Act to incorporate the Most Worshipful Grand Lodge of Ancient Free-masons of Alabama, and its Masonic Jurisdiction. Passed, June 16, 1821.

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened, That Major-General Thomas W. Farrar, grand master, and others, the officers and members of the most worshipful grand lodge of ancient free-masons of Alabama and the subordinate lodges under its jurisdiction, and the several persons who now are, or shall hereafter be, members respectively of said grand lodge or the subordinate lodges under its jurisdiction, shall be, and they are hereby declared to be, a body politic and corporate, in name and in deed, by the name and style of the Most Worshipful Grand Lodge of Ancient Free-masons of Alabama,*

and its Masonic Jurisdiction; and, by the same name, shall have succession perpetual of officers and members, and a common seal, with power to change, alter, and make new the same, as often as the said corporation shall judge expedient.

“SECTION 2. *And be it further enacted*, That the said society, and the lodges under its jurisdiction, shall be able and capable in law to purchase, have, hold, receive, enjoy, possess, and retain, to itself or any lodge under its jurisdiction, or any of them, in perpetuity, or for any term of years, any lands, tenements, or hereditaments, of what kind or nature soever, not exceeding the value of twenty thousand dollars; and to sell, alien, exchange, or demise or lease the same, or any part thereof, as the said corporation shall think proper; and by the same name to sue and be sued, to plead and be impleaded, answer and be answered unto, in any court of law or equity in this State; and to make such rules, orders and by-laws, not repugnant to the laws of this State, as may be necessary for the order, rule, good government, and management thereof; and it shall and may be lawful for the said society to constitute subordinate lodges, and to do all other things concerning the government, the estates, moneys and revenues of said grand lodge and subordinate lodges.

“SECTION 3. *And be it further enacted*, That it shall and may be lawful for the said corporation to take and hold forever any charitable donation, *on* (?) devises and bequests of lands, not exceeding ten thousand dollars; and to appropriate the same for the benefit of said corporation, in such manner as may be determined by the same.

“SECTION 4. *And be it further enacted*, That the said corporation shall be capable in law to have, hold and receive, possess and enjoy, all such estates, real and personal, moneys, goods, chattels and effects, which may be devised or bequeathed thereto, by whatever name such gift, devise or bequest may be made, and to receive subscriptions and other contributions.

“SECTION 5. *And be it further enacted*, That this act shall be deemed and taken as a public act, and notice thereof shall be taken in all the courts of justice and elsewhere

in this State, and shall be given in evidence, on any trial of any issue or cause, without special pleading.

"SECTION 6. *And be it further enacted*, That this act shall take effect from and after the passage thereof."

The defendants then read in evidence certain extracts from the published proceedings of the plaintiff at its annual communications, showing its action with regard to the loan of its funds, the preference to be given to institutions of learning under masonic influence, the form of security to be taken from borrowers, &c.; and tending to show that the money, for which the note here in suit was given, was loaned by the plaintiff to the *Central Masonic Institute* at Selma. "This being all the evidence, the court charged the jury, at the request of the defendants, that if they believed the evidence, they must find for the defendants; to which charge the plaintiff excepted, and was thereby compelled to take a nonsuit."

The charge of the court is here assigned as error.

WM. M. BYRD, for appellant.—1. The appellant's charter shows on its face that it was incorporated for charitable purposes; and the evidence introduced by the defendants in the court below tends to establish the same thing.—18 B. Monroe, 41; 5 Ohio, 59; 3 Zab. 510; 3 Duer, (N. Y.) 648; 17 Geo. (Miss.) 574; 5 Wis. 178. The express grant of power to dispose of its moneys, contained in the 2d section of the appellant's charter, implies a grant of the right to loan money for the purposes contemplated by its charter, and the incidental power to take the customary securities for its repayment. None of the cases cited for the appellees is inconsistent with this proposition.

2. If the note was void, the plaintiff was nevertheless entitled to recover under the common count.—Waddill v. Ala. & Tenn. Rivers Railroad Co., 35 Ala. 323; Hitchcock v. Lukens, 8 Porter, 333; Upchurch v. Norsworthy, 15 Ala. 705.

GEO. W. GAYLE, with ALEX. WHITE, *contra*.—1. The

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power to lend money is a banking privilege, which cannot be exercised by a corporation without an express grant in its charter.—N. Y. Fire Ins. Co. v. Ely, 5 Conn. 560; People v. Utica Ins. Co., 15 Johns. 390. Lending money was not one of the objects for which the plaintiff was incorporated.—2 Cranch, 127; 4 En. Law & Eq. 426; 31 Ala. 82; 19 Johns. 6; Beatty v. Knowles, 4 Peters, 171.

2. The contract for the loan of the money being void, no recovery could be had under the common counts. 3 Wendell, 573; 5 Porter, 279; 4 Ala. 561; 1 Term, 299.

A. J. WALKER, C. J.—The defendants and George P. Blevins, as to whom the suit abated in consequence of his death, executed their promissory note for the consideration of money loaned by the plaintiff. The recovery of the money was resisted, upon the ground that the plaintiff had no authority to make a loan of money; and the court below, by its charge, sustained the defense. We are constrained by our convictions of the law to approve the charge.

The authority of corporations is limited by their chartered powers, and the necessary and proper means of executing those powers.—City Council of Montgomery v. M. & W. P. R. Co., 31 Ala. 76; *Ex parte* Burnett, 30 Ala. 461; M. & A. v. Allaire, 14 Ala. 400; Smith v. Ala. L. I. & T. Co., 4 Ala. 558; State v. M. & A. of Mobile, 5 P. 279, 309; State v. Stebbins, 1 St. 299; Straus v. E. Ins. Co., 5 Ohio, 59; A. & A. on Cor. 270, § 256. The second section of the plaintiff's charter confers authority to take and hold real estate, of value not exceeding twenty thousand dollars, and to sell, lease or exchange the same, to sue and be sued in the corporate name, to make rules for the government of the institution, to constitute subordinate lodges, "and to do all other things concerning the government, the estates, moneys and revenues of said grand lodge and subordinate lodges." The third section confers authority to take and hold any charitable donation, or devises and bequests of lands, not exceeding ten thousand dollars, and to appropriate the same for the benefit of the corporation, in such manner as might be determined

by the same. The fourth section bestows a capacity to have, hold and receive, possess and enjoy, all such estates, real and personal, moneys, goods, chattels and effects, which may be devised or bequeathed thereto, and to receive subscriptions and contributions. The foregoing is an epitome of the grants of power, so far as it is necessary to consider them in this case.

Only two of the grants of power have any relation to money. One of those grants is made in the second section, and confers power "to do all other things concerning" the moneys and revenues of the corporation. The other of those grants, found in the fourth section, empowers the corporation to "have, hold and receive, possess and enjoy" all moneys which may be bequeathed to it. The former of those grants should not be understood to authorize the corporation to do anything that it might will with its funds. If so understood, a vague generality would become the warrant of authority to invest in any business or enterprise known to trade or commerce; and a corporation, designed to be one of few and limited powers, might engage in the most extensive and varied operations. Grants of power to corporations, unlike the grants of individuals, are to be strictly construed, in favor of the government, and against the grantee. Corporations can claim nothing that is not clearly given. Ambiguities operate against them. "In the construction of every charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation."—*Penn. R. R. Co. v. Canal Comm'rs*, 21 Penn. 9; *Richmond R. R. Co. v. Louisa R. R. Co.*, 18 Howard, 81; *Sedgwick on Stat. & Con. Law*, 338-342.

The clause granting the power to do all other things concerning the money and revenues being vague and ambiguous, we must not strive to give it the largest operation, but rather to limit it until there shall be no doubt, lest it may have a larger scope than was intended by the legislature. It must be restricted by the purposes and other powers of the corporation.—*City Council of Montgomery v. Wetumpka Plank R. Co.*, *supra*; *Beatty v. Knowles*, 4 Pet. 171. It must be regarded as only conferring an ample

discretion over the revenue of the corporation, in carrying out the specified powers conferred upon it, and in accomplishing the purposes of its creation. We take a like view of the power to possess and enjoy money bequeathed to the corporation. The money must be enjoyed by the employment of it in exercising the specified powers, and in executing the purposes of the corporation.

There is no specified power granted to this corporation, in the exercise of which the loaning of money becomes an appropriate or necessary means. Nor is there any purpose to be accomplished by the corporation, as indicated in the charter, which requires a resort to the loaning of money. There is some evidence afforded by the third section, that the purpose of the society is charity; but the loaning of money is by no means a necessary means of accomplishing charitable purposes.

Contracts of corporations, which they have no power to make, are void, and courts of justice will not enforce them. So, also, promissory notes, and other instruments, given to secure the performance of the contract, are void. No action to enforce the contract, whatever form the pleader's skill may give it, can be maintained.—3 Wend. 582; 7 Wend. 34; 25 Wend. 648; 5 Barb. 20. It is true, that money loaned may be recovered under a common money count. But then a recovery under a common count, in this case, would be an enforcement of a void contract, as effectually as if it had been under a special count, setting forth the contract.

The decision in *Waddill v. Ala. & Tenn. Rivers R. R. Co.*, (35 Ala. 323,) has no pertinency to this case. In that case, the money was loaned without the authority of the corporation. Here, such is not shown to have been the case. The corporation, transcending its powers, made the loan.

Judgment affirmed.

WITHERS vs. COYLES.

[ACTION BY MASTER, AGAINST MUNICIPAL MAGISTRATE, FOR FALSE IMPRISONMENT OF SLAVE.]

1. *Power of municipal magistrate, under ordinance, to imprison slave in default of bond for good behavior.*—Under the 15th section of the act of 1844, “to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same,” (Session Acts 1843-4, p. 180,) and the ordinance “for the punishment of vagrants and disorderly persons,” (Digest of City Charters and Laws of Mobile, 145,) the mayor has no authority or jurisdiction to require a slave to give a bond for his good behavior, or to commit him to jail in default of the execution of such bond.
2. *When civil action lies against magistrate.*—If a municipal magistrate erroneously determines, on the evidence adduced before him in a particular case, that a slave is a free person of color, and therefore inflicts on him the punishment ordained exclusively for free persons of color, he is not liable to a civil action at the suit of the slave’s master; *secus*, if, after correctly determining the *status* of the slave, he inflicts on him the punishment provided exclusively for free persons of color.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

The complaint in this case was in these words:

“James Coyles vs. Jones M. Withers, and Henry Maury.”	}	The plaintiff claims of the defendants five hundred dollars damages, for the wrongful taking and keeping of a slave belonging to plaintiff, named Battiste, for a long space of time. Also, a like sum, for unlawfully imprisoning and keeping said slave, the property of plaintiff, knowing him to be the property of plaintiff. Also, a like sum, for wrongfully causing said slave to be imprisoned and kept from plaintiff. Also, because, plaintiff being the owner of said slave, and having hired him to one F. Hurtel, upon the terms and condition that said Hurtel should pay for the hire of said slave a large sum of money, to-wit, at the
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rate of twenty dollars per month during the time he should be in said Hurtel's employment, and that plaintiff should receive nothing for, and should be himself the loser of all the time during which said slave should, by sickness or any other cause of absence, be out of said Hurtel's employment; they, the said defendants, caused said slave to be unlawfully imprisoned, and kept in close confinement, and out of the employment of said Hurtel and plaintiff, for a long space of time, to-wit, the space of four months. To plaintiff's damage two hundred dollars."

The defendants demurred to the complaint, on the following specified grounds: "1st, because there is a misjoinder of actions; and 2d, because the defendants do not know, from the complaint, whether the action is assumpsit, trover, trespass for false imprisonment, or an action on the case for damages, and cannot tell what plea to make and put in." The court overruled the demurrer, and the defendants then pleaded "the general issue, with leave to give in evidence any special matter of defense."

On the trial, as the bill of exceptions shows, the plaintiff read in evidence certain entries on the docket of the defendant Withers, "as acting mayor of the city of Mobile," and in his handwriting, showing that the slave Battiste was tried and examined before said Withers, on the 27th October, 1856; and that a judgment was then rendered against him, as expressed in the entry on the docket, in these words: "Stripes, and bond, \$500, good behavior"; but the nature of the charge against him was not described in said entries, except by the single word "Examination." "The plaintiff then proved, that said slave belonged to him, and, at the time of the seizure and imprisonment, was hired out, under a special contract, to one Hurtel of Mobile, and was in his possession and service, in the business of storing and compressing cotton; that the services of said slave were worth \$16 66 per month; that said slave was whipped under the orders entered on said docket, and, on the non-execution of the bond as therein specified, was, on the 27th October, 1856, by the order of the defendant Withers, committed

to the city guard-house, and remained in confinement under that commitment until the 17th January, 1857."

"The defendant Withers then proved, that he was the mayor of the city of Mobile at the time said orders and commitment were made, and made said orders and entries in his official character as such mayor; and offered in evidence the charter for the incorporation of the city of Mobile, and the ordinances of said city, legally and regularly passed; and justified said orders and commitment under the facts and evidence herein stated. The defendant introduced evidence tending to show that, on said 27th October, 1856, said slave was brought before him, while holding court as mayor, and was charged with gambling on the Saturday night previous, with some eighteen other negroes, on the premises of said Hurtel, contrary to the city laws and ordinances; [and that proof was at the same time made to him, so sitting as mayor, that said slave was a dangerous and disorderly character, and had kept an assignation-house, and had repeatedly violated the laws of the city and State, and continually eluded the police officers, and resisted them by struggling to get away and running, and frequently escaped from them. He offered evidence, also, tending to show that, on the hearing of said complaint before him, evidence was adduced tending to show that, prior to said complaint, various citizens of Mobile had frequently complained to the police that they lived in terror and alarm of said slave, and were afraid to leave their houses on account of him; that he had been brought up before a former mayor of the city, in the year 1854, on a charge of burglary, and had been shot at therefor; that he stole fowls, and had been in the habit of having unlawful assemblies of slaves at his house, and of gambling with slaves at night, and of harboring runaway slaves, and had kept an assignation-house for persons of ill fame; that he very frequently changed his place of staying at night; that it was difficult for the police officers to find him, and difficult to arrest him when found; that he had gone greased, in order to facilitate his escape, and wore his clothes without buttons, in such a manner that he could

and did readily divest himself of them when seized; that he had to be overcome when arrested, and fought and resisted one of the officers; that he was a bad and dangerous character; that he was found on the night preceding said examination and complaint, with some eighteen other negroes, in a cotton-press then rented and used by said Hurtel, where it was unlawful for him to be at such a time, and for such a purpose; that said slaves were singing, dancing, and gambling; that when ordered by the officers to open the door of the house, they refused, and the door had to be prized open by the officers. One of the defendant's witnesses, who was one of the police officers who arrested said slave, testified, on cross-examination, that he had never heard of said slave resisting or using violence towards any white person; and there was no evidence before the mayor that he had done so, except of his having once resisted a police officer who was trying to arrest him; that said slave made his escape, and was arrested with great difficulty on the next day; and that he refused to surrender to the police officers, even when they threatened to shoot him if he did not, but did not resist them except by trying to elude them.] It was upon the evidence and complaints above stated that the said entries and orders were made by said Withers in his official capacity, and while holding his court as mayor; and evidence was offered by him to show that such was the case, and that the whipping was ordered and inflicted for the charge of gambling. The defendant offered to prove the facts and matters above set forth; but the court would not permit him to prove the matters" which are enclosed in brackets, "unless he proposed to further prove, that complaint was also made of threats or danger from said slave to the person or property of some particular individual, which said defendant did not propose to do; and to this ruling of the court said defendant excepted."

"The court ruled as follows: 1. That slaves were not within the provisions of the 15th section of the city charter, approved January 15th, 1844, in these words: '*To cause all vagrants, idle or disorderly persons, all persons of*

evil life or ill fame, and all such as have no visible means of support, or are likely to become chargeable to the city as paupers, or are found begging, or drunk in or about the streets, or loitering in or about tippling-houses, or who can show no reasonable course of employment in business in the city, all who have no fixed place of residence, or cannot give a good account of themselves, all who are grossly indecent in language or behavior publicly in the streets, and all public prostitutes, or such as lead a notoriously lewd or lascivious course of life, to give security for their good behavior for a reasonable time, and to indemnify the city against any charge for their support, and, in case of their inability or refusal to give such security, to cause them to be confined to labor for a limited time, not exceeding four calendar months, unless such security shall sooner be given,—which said labor shall be designated by the said mayor, aldermen and common council, for the general benefit of the said city; and that the labor so designated shall be carried into effect, the said mayor, aldermen and common council shall have power to appoint a person or persons to take those so confined and sentenced to labor from their place of confinement to the place appointed for their working, and watch them while at labor, and return them before sundown to the place of confinement; and if they shall be found afterwards offending, such security may be again required, and, for want thereof, the like proceedings may again be had, from time to time, as often as may be necessary'; and that the ordinance made under said section, entitled 'An ordinance for the punishment of vagrants and disorderly persons', did not embrace slaves within its provisions; and that the defendant, as mayor, had no right to require a bond that said slave should keep the peace and be of good behavior, or be committed in default thereof.

"2. That the defendant had no right under the statutes of the State, as magistrate and conservator of the peace, to require that a bond to keep the peace should be given for said slave, and, if not given, to order the commitment of said slave, unless complaint and proof were made of danger or threats from said slave to the person or property of some particular individual.

"3. That if the defendant had no right to require such

bond to be given, or to order such commitment, in the case proposed to be proved, he could not be protected on the ground that he was acting judicially in making such an order, but was liable to the plaintiff for the damage sustained by the loss of the slave's hire or services for the time he was imprisoned by reason of the imprisonment."

To each of these rulings of the court the defendant excepted; and he now assigns them as error, together with the overruling of the demurrer to the complaint, and the exclusion of the evidence as above stated.

There was an agreement of record between the counsel of the respective parties, "that the city charter and ordinances, as printed and published before the 27th October, 1856, may be read in evidence in the supreme court, as if embodied in the bill of exceptions." The material portions of the charter and ordinances, it is believed, are copied in the opinion of the court. As no copy of them accompanies the record, or has been furnished to the reporter, he can only refer to them as cited in the opinion.

R. H. SMITH, for appellant.

A. R. MANNING, *contra*.

STONE, J.—While slaves are, under our system, property and chattels, they are, nevertheless, in many senses, persons. We had occasion to consider this question in the case of *Hudson v. The State*, 34 Ala. 253. Hence, in many cases, and for many purposes, we would hold, that the word *persons*, when employed in a statute, includes slaves as well as free white persons. Whether slaves are included in the descriptive word *persons*, as found in the Mobile city charter and ordinance enacted thereon, which are brought to view in the present case, must depend on the intention of the law-making power, to be gathered from the language in which the legislation is clothed.

In 1844, an act was passed, consisting of many sections, "to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same." See Digest of City Charters, (1849,) p. 17. Section 15 of that consolidated act (Pamphlet Acts 1843-4, p. 175; Di-

gest of City Laws, pp. 29, 30) empowers the mayor, aldermen and common council to enact by-laws and ordinances, for various sanitary and police purposes, affecting the welfare of the city. These powers are apparently classified and arranged, in accordance with the objects of which they treat. That portion of the charter which bears on the questions presented by this record, is in the following language: "To restrain and prohibit the nightly and other meetings or disorderly assemblies of slaves, free negroes and mulattoes; to punish such slaves by whipping, not exceeding twenty stripes, and to punish such free negroes and mulattoes and other persons for such offense, by affixing penalties, not exceeding fifty dollars for any one offense, and, in case of the inability of any such free negro, mulatto, or other person, to pay and satisfy any such fine or penalty, and the costs thereon, to have such free negro, mulatto or other person to be confined to labor, for such reasonable time, not exceeding three calendar months for any one offense, as may be deemed equivalent to such penalty and costs,—which said labor shall be such as shall be designated by said mayor, aldermen and common council, for the general benefit of said city; to cause all vagrants, idle or disorderly persons, all persons of evil life or ill fame, and all such as have no visible means of support, or as likely to become chargeable to the city as paupers, or are found begging, or drunk in or about the streets, or loitering in or about tippling-houses, or who can show no reasonable course of employment in business in the city, all who have no fixed place of residence, or can not give a good account of themselves, all who are grossly indecent in language or behavior publicly in the streets, and all public prostitutes, or such as lead a notoriously lewd or lascivious course of life, to give security for their good behavior for a reasonable time, and to indemnify the city against any charge for their support, and, in case of their inability or refusal to give such security, to cause them to be confined to labor for a limited time, not exceeding four calendar months, unless such security shall sooner be given,—which said labor shall be designated by the

said mayor, aldermen and common council, for the general benefit of said city," &c.

Under these provisions of the charter, the mayor, aldermen and common council of Mobile passed an ordinance of twenty sections, "respecting slaves", the penalties for the violation of which were, in every instance, corporeal punishment.—Digest of City Charters, &c. 138. The city government also enacted an ordinance, "for the punishment of vagrants and disorderly persons."—Digest, 145. In this ordinance, the language of the charter in reference to this class of persons, given above, is literally copied; and the penalties provided by this ordinance are bonds for good behavior, and, in default of bonds, commitment to some place of confinement, to labor, &c.

It is not our intention, in this opinion, to declare whether the city government of Mobile may or may not institute precautionary measures of restraint, to operate upon the disorderly and insubordinate slave population within their midst. Nor do we affirm that the mayor may not, as a conservator of the peace, require that bond and security be given for the appearance of a slave at court, to answer for a criminal offense, or to keep the peace, in a proper case; and, in default of bond, commit the slave to prison for safe custody. The commitment in this case was for neither of the purposes last mentioned; and hence those questions are not before us. The imprisonment in this case was under the ordinance "for the punishment of vagrants and disorderly persons." The language of this ordinance, viewed in connection with the provisions which are expressly made for slaves, forces on us the conviction, that slaves are not within the purposes, provisions or spirit of the enactment which requires bond for good behavior. The mayor erred in requiring bond for the good behavior of the slave Battiste, and in committing him to prison in default of such bond.

[2.] The question of the liability of judicial magistrates, for errors committed by them in the discharge of their official functions, has been much discussed. Two distinctions have been taken: 1st, between courts of general, and courts of limited or special jurisdiction;

and, 2d, between the erroneous exercise of powers within the jurisdiction of the court or magistrate, and the exercise of authority not within his jurisdiction. A third distinction, between honest mistakes and fraudulent or malicious abuse of authority, has been also considered; but no question of the latter kind has been presented by this record.

The jurisdiction of the mayor of Mobile is of the class called limited, or statutory; and hence we need not consider the rule in regard to general jurisdictions.—See the case of the *Marshalsea*, 10 Rep. 68; *Yates v. Lansing*, 5 Johns. R. 282, 287; *Hamilton v. Williams*, 26 Ala. 527.

Whether the appellant is liable in this action, must depend on the inquiry, Did he, in committing the slave to prison, simply err in a matter within his jurisdiction, or did he transcend the boundaries of his jurisdiction? In *Doswell v. Impey*, (1 B. & C. 169,) Abbott, C. J., said: "The general rule of law, as to actions of trespass against persons having a limited authority, is plain and clear. If they do any act beyond the limitation of their authority, they thereby subject themselves to an action of trespass; but, if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such an action."—See *Duckworth v. Johnson*, 7 Ala. 578; *Craig v. Burnett*, 32 Ala. 728.

A distinction is well taken in the books, between those cases where, the facts being plain and clear, the judicial magistrate misapplies the law to those plain facts, and cases in which the facts appear erroneously in evidence, or the judge or magistrate by mistake draws an erroneous conclusion of fact from the proof in the particular case. The inferior magistrate is responsible, not for the abstract truth of the case before him, but only for the case as it appeared before him on the trial. For errors of fact, or for an erroneous judgment as to matters of law within his jurisdiction, he is not responsible. For assuming, however, that he has jurisdiction to do a particular thing, on certain facts proved, or supposed to exist, when he has no power to do that particular thing

on the state of facts proved or supposed to exist, he transcends his jurisdiction, and becomes a trespasser.

Application: If, on the trial, the mayor had concluded from the evidence, whether correctly or otherwise, that Battiste was a free person of color, and had inflicted on him such punishment or restraint as the ordinance authorized to be inflicted on free persons of color, no one would be heard to complain, in a suit such as this, either that the mayor had erroneously found Battiste to be free, or that he had adjudged him guilty on insufficient testimony. If, however, Battiste was a slave, and was so found by the mayor, and thereupon the mayor imposed on him such penalties and disabilities as were provided and ordained for free persons exclusively,—then the mayor, in this particular, acted beyond the scope of his jurisdiction. These principles are fully sustained by the following authorities: *Duckworth v. Johnson*, *supra*; *Craig v. Burnett*, *supra*; *Morrow v. Bird*, 6 Ala. 824; *Sasnett v. Weathers*, 21 Ala. 673; *Lowther v. Earl of Radnor*, 8 East, 113; *Houlden v. Smith*, 14 Ad. & El. (N. S.) 841; *Edwards v. Ferris*, 7 C. & P. 542; *Cooper v. Horton*, 8 Dowl. & Ryl. 166; the case of *Marshalsea*, 10 Rep. 68, 76, *et seq.*; *Terry v. Huntington*, Hard. 480; *Pratt v. Hill*, 16 Barb. 303; *Marsh v. Williams*, 1 How. (Miss.) 132; *Bigelow v. Stearns*, 19 Johns. 39; *Suydams v. Keyes*, 13 Johns. 444; *Blood v. Sayre*, 17 Verm. 609; *Coltraine v. McCain*, 3 Dev. 308; *Jones v. Hughes*, 5 S. & R. 299; *Cohoon v. Speed*, 2 Jones' Law Rep. 133; *Piper v. Pearson*, 2 Gray, 120; 5 Bouv. Bacon, *Justice of the Peace*, F., pp. 430, 431; 2 Hill. on Torts, 320, *et seq.*

It is one of the uncontroverted facts in this case, that Battiste was a slave. There is no pretense that any evidence was offered before the mayor that he was free. Under these circumstances, we hold, that the mayor had no authority to require a bond that such slave would be of good behavior; and that, in committing Battiste to prison in default of such bond, he acted beyond his jurisdiction.

The rulings of the circuit court are in accordance with these views, and its judgment is affirmed.

ALLEN vs. MARTIN.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Compensation of guardian.*—Under the provisions of the Code. (§§ 2039, 1825,) a guardian is not entitled to any compensation for his services in lending out the funds of his ward, and compounding the interest accruing thereon: that being one of his ordinary duties, and not belonging to the class of "special or extraordinary services."

APPEAL from the Probate Court of Montgomery.

IN the matter of the final settlement of the accounts of Abram Martin, as guardian of Wade H. Allen, his late ward; which was before this court, on a former appeal by the ward, at the June term, 1859.—See the case reported in 34 Ala. 442. On the last settlement before the probate court, as shown by the bill of exceptions in the present record, that court allowed the guardian, in addition to his commissions on receipts and disbursements, one-and-a-quarter per cent. on the amount of money loaned out by him each year, for his services in lending out the money, and compounding the interest accruing thereon; holding that these were "special, or extraordinary services." The ward reserved an exception to this ruling of the court, and also to several other rulings on the admissibility of evidence offered by the guardian to sustain this charge; but these latter rulings require no particular notice. The settlement covered a period of six years, extending from June, 1853, to June, 1859. The amount of the final decree in favor of the ward was \$24,425. The entire compensation allowed to the guardian was—commissions on receipts, \$649 70; commissions on disbursements, \$105; compensation for extraordinary services, \$1340—making in all, \$2,094 70. It was shown that there was no difficulty, during the years through which

the settlement extended, in lending out money in Montgomery at legal interest. The rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error:

WM. A. GUNTER, for appellant.—The allowance of compensation to the guardian, for his services in lending out his ward's money and compounding the interest, cannot be sustained on the ground that those services were special or extraordinary. It is one of the ordinary duties of every trustee, under an express trust, to invest surplus funds when practicable, and thereby make interest. 5 Kent's Com. 230-31; Lewin on Trusts, 336, 358; Hill on Trustees, 368-69; Harrison v. Mock, 10 Ala. 193; Dunsecomb v. Dunsecomb, 1 Johns. Ch. 598; Green v. Winter, *ib.* 26; Manning v. Manning, *ib.* 527; Schiefelin v. Stewart, *ib.* 620. Section 2024 of the Code, expressly enjoining this duty, and amplifying the discretion of the trustee, is but declaratory of the common law. That special compensation cannot be allowed for the performance of ordinary duties, see O'Neill v. Donnell, 9 Ala. 734; Harris v. Martin, 9 Ala. 895. The allowance cannot be sustained on the ground that any peculiar difficulty or trouble attended the performance of the service; because the evidence showed that money could easily be loaned at legal interest—in fact, that there was always a demand for it.

M. A. BALDWIN, *contra*.—In the settlement of guardians' accounts, the law providing for the settlement of the accounts of executors and administrators is applicable, (Code, § 1825;) and this statutory provision has been construed to mean, that the same rule of compensation applies in both cases.—Allen v. Martin, 34 Ala. 442. In Gresham v. Reese, (29 Ala. 91,) it was held, that lending money by an administrator was an extraordinary service, for which he is entitled to receive extra compensation; and the same rule must be applied here. Any other rule would give the same compensation to a guardian who had managed his ward's estate for twenty years, lending out

his money, and compounding the interest annually, and to one who had discharged the same duties for one year.

R. W. WALKER, J.—When this case was here before, we held that the effect of section 2039 of the Code was, to render section 1825 applicable to guardians, as well as to executors and administrators.—Allen v. Martin, 34 Ala. 442. The plain intention of the legislature, in making section 1825 applicable to guardians, was, that they should receive the same compensation for the performance of the ordinary duties of their office, which is allowed executors and administrators for the performance of the ordinary duties of the office of executor or administrator; and that they should also be allowed “actual expenses, and for special or extraordinary services such compensation as is just.” The offices of guardian and administrator are different, and each has its respective ordinary and extraordinary duties. Some of the services which belong to the ordinary duties of a guardian, might, if performed by an administrator, be justly considered as extraordinary; and *vice versa*. For the performance of the duties which attach as ordinary incidents to the particular office, the only compensation authorized by law is in the shape of commissions upon the moneys received and disbursed; and these are limited to two-and-a-half *per cent.* upon the receipts, and the same percentage upon the disbursements; while, for the discharge of special or extraordinary services—that is, of those which do not form a part of the customary or regular duties of the office—such compensation may be allowed as, under the circumstances of the particular case, is just.—Code, § 1825; Newberry v. Newberry, 28 Ala. 691; Reese v. Gresham, 29 Ala. 91; Allen v. Martin, *supra*.

On the final settlement of the appellee, the probate court allowed him two-and-a-half *per cent.* commissions on his receipts and disbursements, and a considerable additional amount, not as actual expenses incurred in discharging his duty as guardian, but as compensation for services rendered by him in lending the funds of his ward,

and compounding the interest accruing thereon, through a period of six or seven years. The only question we are to decide, therefore, is, whether the service which is performed by a guardian in lending his ward's money, and compounding the interest thereon, through a series of years, belongs to the class of "special or extraordinary services," within the meaning of section 1825 of the Code. That this question must be answered in the negative, seems too plain for controversy.

Independent of any statute upon the subject, it is one of the *ordinary* duties of a guardian to invest the surplus funds of his ward, and make interest thereon, whenever it is practicable to do so.—Hill on Trustees, §§ 368-9; 2 Kent, 230-1. Section 2024 of our Code is in these words: "It is the duty of the guardian to manage the estate of his ward frugally, and to improve it to the best of his skill and ability. *He must, if practicable,* lend out the surplus money of the ward, on bond and mortgage, or on good personal security; and if the bond is not renewed annually, require the interest to be paid at the end of each year." When a guardian lends out the surplus money of his ward, and either renews the note annually, or collects the interest at the end of each year, he performs one of the universal, certain, and ordinary services incident to his office. For such services, the only compensation which the law allows him, is such as may be furnished by the regular commissions upon his receipts and disbursements.—Authorities *supra*; see, also, O'Neill v. Donnell, 9 Ala. 734.

Peculiar circumstances may sometimes render the discharge of an ordinary official duty unusually difficult and troublesome. The case of O'Neill v. Donnell, 9 Ala. 734, seems to decide that this circumstance would not affect the measure of compensation. If it be conceded, however, that in such a case, the extra labor and trouble necessary to the discharge of the duty would fall under the denomination of "special or extraordinary services," the concession would be of no avail to the appellee. The bill of exceptions repels the idea, that the guardian would have found any special difficulty in pursuing the directions

of section 2024 of the Code, or that in lending out his ward's funds he performed any service which can be fairly classed as special or extraordinary.

The probate court erred, in allowing the guardian any compensation, beyond two-and-a-half per cent. commissions on his receipts and disbursements, for the services performed in lending out the funds of his ward, and compounding the interest thereon.

Decree reversed, and cause remanded.

BOAZ vs. BOAZ.

[BILL IN EQUITY TO REMOVE HUSBAND AS TRUSTEE OF WIFE'S SEPARATE ESTATE.]

1. *Removal of husband as trustee.*—A deliberate and permanent abandonment of the wife by the husband, without reasonable cause, is sufficient (Code, § 1994) to authorize his removal from the trusteeship of her statutory separate estate.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 1st February, 1858, by Mrs. Jane H. Boaz, suing by her next friend, against her husband, Peter C. Boaz, for the purpose of removing him from the trusteeship of her statutory separate estate. It alleged, that the parties were married, in Dallas county, Alabama, in September, 1854; that the complainant at that time owned and possessed, as her separate estate, personal property to the value of \$30,000; that the defendant, soon after the marriage, purchased a valuable tract of land at an administrator's sale, and took the title to himself, though the purchase-money (nearly \$12,000) was paid out of the complainant's separate means; that the complainant then filed a bill in chancery

against him, to compel a divestiture of the legal title to this land; that the defendant shortly afterwards abandoned her, "declaring that, as an honorable man, he could not live with her any longer"; that he removed to his own plantation, about four miles distant from the place where he and the complainant had been living, and carried with him an infant daughter, the only child of the marriage, together with a great many articles of household furniture, provisions, and plantation utensils, which had been purchased with the complainant's money; and that he placed an overseer on the plantation where the complainant was left, for the purpose of watching and annoying her. An answer under oath having been waived by the complainant, the defendant's answer was not sworn to. He admitted the marriage as charged, and that the complainant then had about twenty slaves, which went into his possession; that he purchased a tract of land as alleged in the bill, and took the title in his own name, but not that the purchase-money was paid with the complainant's funds. He further admitted that he did abandon the complainant at the time specified in her bill, and then declared to her that, as an honorable man, he could not live with her any longer; but he alleged that his reason for thus acting, as the complainant well knew, was the conviction that she was unfaithful to him; and he detailed some of the circumstances which had forced this conviction on his mind. He admitted, also, that he had carried with him the only child of the marriage, and many articles of personal property; but insisted that he had a right to do so, and that none of the property taken belonged to the complainant; and he denied that he had been guilty of any improper conduct as trustee of the complainant's separate estate.

On final hearing, on pleadings and proof, the chancellor held, that the defendant's charge of infidelity on the part of the complainant was not sustained by the evidence; but that his voluntary abandonment of her, coupled with his false accusation against her chastity, was not sufficient, under the statute, to justify his removal from the office of trustee of her separate estate; and

he therefore dismissed the bill, at the costs of the complainant's next friend.

The chancellor's decree is here assigned as error.

ALEX. & JNO. WHITE, for appellant.—The husband's statutory rights in and to the wife's separate estate present an anomaly in the law. As trustee and husband, he is entitled to manage and control the *corpus* of her property, and to receive the rents, income and profits thereof; not absolutely as his own, because they are not subject to his debts; and yet not simply as trustee, because he is not accountable to his *cestui que trust*. His rights and duties are founded on the two-fold relation of husband and trustee. The rents and profits of the wife's estate are given to him, not for his own benefit, but to enable him to provide for the expenses of the family. The law presumes that the husband and wife live together, and the marriage contract is based upon this presumption. The duties of the husband, as the head of the family, can only be fulfilled while they are thus living together. He cannot properly provide for the wants of the family, when he has dissolved the family relation. He cannot protect and take care of the wife, as by law bound to do, when he has voluntarily abandoned, and is living separate and apart from her. When he has thus abjured all the duties and obligations of the marriage relation, he no longer has the power, even if he had the will, to manage and control the wife's separate estate as the law intended he would; and when his abandonment is caused by an unfounded jealousy, as shown in this case, it is to be presumed that he has not the will, even if he had the ability. A voluntary abandonment of the wife, coupled with a false accusation against her chastity, shows such moral perversion and bad faith on the part of the husband, as renders him unfit to be her trustee.

BYRD & MORGAN, *contra*.—The record contains no evidence impeaching the defendant's capacity or competency to act as trustee of his wife's separate estate. He is shown to be a prudent and discreet manager, and has

been guilty of no misconduct whatever in relation to the wife's property. His voluntary abandonment of the wife, after it has continued three years, will be good cause of divorce in her favor, and thus remove him from the office of trustee. But, until the expiration of that period, he has the *locus penitentie*—an opportunity to test the truth of his suspicions. If his suspicions are well founded, the abandonment was justifiable and proper; and if the admissions of the answer are sufficient to establish the fact of abandonment, they ought also to be held sufficient to prove the cause of that abandonment.

A. J. WALKER, C. J.—The pleadings and proofs in this case compel us to decide, that the defendant abandoned the complainant without reasonable cause; that the abandonment was a deliberate act; that it is permanent, and that there is no prospect that the defendant will at any time hereafter admit the complainant into his society as his wife. Upon these facts alone we decide, that the defendant should be removed from the position of trustee for his wife.

The causes prescribed in the statute, for the removal of the husband as the trustee of a wife having a separate estate, are, that from imbecility, intemperance, or some other cause, he is incapable of, or unfit for, the discreet management and control of the separate estate.—Code, §§ 1994, 1995. The unfitness for the management of the separate estate must be defined with reference to the nature of the trust, and to its purposes. The management of a married woman's separate estate, which the law contemplated, does not have relation alone to the control of the property; but it has relation also to the purposes to be subserved by the trust. It is true this court has held, that by virtue of the husband's exemption from accountability for the rents, income and profits of the separate estate, he is clothed with a right to such rents, income and profits while he remains trustee, even including the crop ungathered at the wife's death.—*Weems v. Bryan and Wife*, 21 Ala. 302; *Manning v. Manning*, 24 *Id.* 386; *Whitman v. Abernathy*, 32 *Id.* 154; *Bennett v. Bennett*,

34 Ala. 53. But, in bestowing this right upon the husband, the law does not consult his interest alone. That it does not, is shown by the fact, that on account of imbecility, which may arise from no fault, and may increase his wants, he is liable to be deprived of the rents, income and profits, as a consequence of his removal as trustee. It is also shown by the fact, that the rents, income and profits are not subject to the payment of the husband's debts. The legislature, in making the exemption from liability for the husband's debts, certainly did not look alone to his benefit. It would be a strange anomaly in legislation, if the husband has been clothed with a right to the entire income of the wife's property, exempt from liability to his debts, for no purpose beyond the bestowment of a peculiar boon upon him. But, furthermore, the peculiar language of the statute is indicative of an ulterior purpose. It first declares, that the property is the wife's separate estate; it then vests it in the husband *as a trustee*, and proceeds to declare, not that the income belongs to the husband, but that he shall not be required to account for it. The husband, therefore, holds the property as trustee, and is entitled to the income, merely because he is not required to account for it as trustee. It is a fair inference from these provisions, that the husband is not vested with a title in his own right, for any space of time, to the wife's separate estate; that the law has permitted him to receive the income, with the purpose that he might, as the head of the family, have the means of maintaining that family, and has made it free from liability to debts, in order that his misfortunes or thriftlessness should not prevent the accomplishment of the purpose. This view of the purpose of the legislature is strengthened by the section which makes the *corpus* of the property liable for articles of comfort and support of the household. This section, in allowing the *corpus* of the property to be sold for the support of the family, and the income to the husband to be thus entirely cut off, clearly makes the husband's right subordinate to the great purpose of providing a maintenance for the family.

It is true, the statute has not, in terms, declared the purpose of relieving the husband from liability to account for the rents and profits, and has provided no specific mode of compelling the husband to respect that purpose in appropriating the income. From the nature of the thing, such an obligation must be left to be enforced by the sense of conjugal and parental duty and affection. The law has aimed to place in the hands of the husband, whose wife has a separate estate, the means of maintaining the family, and has freed him from all restraint, and left him untrammelled to exercise his authority and discretion as the head of the family, by saying that he shall not be questioned in law as to those means. The only guaranty, besides the affection of the husband and father, that the husband will make a proper disposition of the income, is found in the remedy which the law gives against the husband, and against the *corpus* of the separate estate, for necessities supplied to the family.

As the income is given to the husband in order that he may out of it support the wife and children, exercising the discretion and authority which pertains to the head of the family; and as the income is placed in his hands as trustee for that purpose, he becomes an unfit instrument for the accomplishment of that purpose, when, without adequate cause, he separates himself from his wife, ceases to be to her a husband, and becomes to her a perpetual alien and stranger. The husband who has permanently abandoned his wife, and has a fixed and unrelenting purpose to subject her to perpetual exclusion from his society, is not fit to receive the income of her separate estate, in order that he may, as her husband, with the discretion and authority of a husband,—an authority tempered and guided by affection,—maintain her and her children. How can he, separated from her, not abiding upon the same premises, not seeing her, or communicating with her, know her wants and prudently meet them?

The husband, in his capacity of trustee, is also charged with the duty of joining with his wife in the sale and conveyance of the property of the separate estate. The

law designed that there should be a union of the judgments of the two in the acts of selling and conveying the property. In the attitude which the husband has assumed towards the wife, it is impossible that this purpose of the law can be carried out. It may be that the interest of the separate estate may require that many articles should be sold; but how could the consultation, the union of purpose, and concert of action, contemplated by the statute, be secured in such a case?

Furthermore, the husband has the discretionary authority to use the proceeds of the sale of the wife's separate estate in such manner as is most beneficial for the wife. The husband, in this case, is not fit to judge what would be most beneficial to his wife. He can not know her wants, and, if he did, his complete alienation from her has unfitted him for the exercise of such a guardianship over her.

An examination of the previous decisions of this court, in reference to the removal of the husband as trustee, will show that the precise point of this case has not been heretofore decided; yet the tendency of the decisions is to the conclusion which we have attained in this case. *Smyth v. Oliver*, 31 Ala. 39; *Fisk v. Stubbs*, 30 Ala. 335; *Andrews v. Andrews*, 28 *ib.* 432; *Bryan v. Bryan*, 35 *ib.* 290.

The decree of the chancellor is reversed, and the cause remanded, for further proceedings pursuant to the foregoing opinion.

COX, BRAINARD & CO. *vs.* KEAHEY.

[ACTION AGAINST OWNERS OF STEAMBOAT FOR NEGLIGENCE.]

1. *Liability of master for wilful act of servant.*—The owners of a steamboat are not liable for damages resulting from a collision caused by the wilful act of their servants and agents in charge of the boat.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by George W. Keahey, against Cox, Brainard & Co., to recover \$800, as the complaint alleged, "for damages done to plaintiff, by collision with, and running into a raft of spars and staves, belonging to plaintiff, by the steamboat *Sallie Carson*, the property of defendants, in the month of December, 1857; such collision being produced by the negligence, want of care, and want of skill of the defendants' servants, then and there having the charge and management of said steamboat." The defendants pleaded not guilty. "On the trial," as the bill of exceptions states, "the plaintiff proved that, in December, 1857, a raft of spars, belonging to him, was floating down the Tombigbee river, with several hands on board, when it was run into by the steamboat *Sallie Carson*, which was coming up the river; that seven or eight of the spars, the value of which was proved, were lost by the collision; that said steamboat belonged to the defendants at that time; that the collision occurred in the morning, soon after sunrise; that the raft was in its proper place, about the middle of the river, with ample room on either side for the steamboat to pass without touching it; that the steamboat hove in sight several minutes before the collision, and, when first seen, was some two or three hundred yards distant from the raft; that she did not ring her bells to stop her engines, or check her speed, until she was on the raft; that she was hailed by the persons on the raft to keep off; that she struck the raft with great violence, and did not stop, after the collision, to inquire what damage had been done. One of the plaintiff's witnesses was asked, on cross-examination, if the collision was caused by the willful act of the officers in charge of the steamboat; and answered, that he did not know, but it seemed so to him. After the court had given its main charge to the jury, the defendants' counsel asked the court to instruct the jury, that the defendants, as owners of the steamboat, were not liable, if the collision was willfully caused by the acts of

their agents or servants. The court refused this charge, and instructed the jury, that the defendants were liable, although the collision was intentionally caused by those in charge of the steamboat." The refusal of the charge asked, and the charge given, to each of which the defendants excepted, are now assigned as error.

GEO. N. STEWART, for appellants.—In the matter of the instructions to the jury, the court erred in two respects. In the first place, the complaint alleging only a liability arising from the negligence of the defendants' servants, a recovery could not be had on proof of a willful act, on account of the variance. In the second place, if the complaint had alleged the willful act as the cause of the damage, no recovery could have been had, because the master is not responsible for the willful torts of his servants.—Edwards on Bailments, 318-19; Story on Agency, § 456; Wright v. Wilcox, 19 Wendell, 343; 2 Kent's Com. 283-4; Gordon v. Rolt, 4 Exch. 365; Sharrod v. Railway Co., *ib.* 580; 24 Conn. 40; McManus v. Crickett, 1 East, 106; Richmond Turnpike Co. v. Vanderbilt, 1 Hill's (N. Y.) R. 489; Redfield on Railroads, 384, 381, 365; Lindsay v. Griffin, 22 Ala. 629; Blackburn v. Baker, 1 Ala. 173.

MANNING & WALKER, *contra*.—1. The defendants, as owners of the steamboat, are liable for damages sustained by the collision, although it may have resulted from the willful act of the pilot, if he was acting at the time in the situation in which they had placed him, and in the course of a voyage which he was making in their service. Phila. & Reading Railroad Co. v. Derby, 14 How. (U. S.) 468, 486; Sleath v. Wilson, 9 C. & P. 607; Vicksburg & Jackson Railroad Co. v. Patton, 31 Miss. 156, 197; Railroad Co. v. Keary, 3 Ohio St. 201-9; Redfield on Railroads, 281, note; Joel v. Morrison, 6 C. & P. 501.

2. If the general rule be as contended by appellants, high reasons of public policy require that an exception should be made as to railroad and steamboat companies, who enjoy a monopoly of trade, whose servants are en-

trusted with a most powerful and dangerous agent, and who might entirely escape liability by the employment of reckless and insolvent persons.

3. The charge asked was abstract.

STONE, J.—In the leading case of *McManus v. Crickett*, (1 East, 106,) Lord Kenyon reviewed the earlier decisions, and, among other things, declared, that “if I command my servant to distrain, and he ride on the distress, he shall be punished, not I.” “When a servant quits sight of the object for which he is employed, and, without having in view his master’s orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act.”

This case has been regarded as an authority for the following propositions: 1st. When the servant is in the performance of his master’s orders, or authorized acts, and, in the doing thereof, conducts himself so negligently or unskillfully that injury results to another or his goods, then the doctrine of *respondeat superior* applies; and the master will be liable in an action on the case. 2d. That for the acts of the agent or servant, willfully and intentionally done, without the command or authorization of the master, the servant is liable, and the master is not.

These principles are asserted in the following authorities: Story on Agency, § 456; 2 Kent’s Com. m. pp. 259, 260; Addison on Contracts, 635; 1 Smith’s Lead. Cases, (notes by H. & W.,) 560; *Foster v. Essex Bank*, 17 Mass. 479; Edw. on Bailments, 318–9; Angell on Carriers, §§ 541, 604; *Wright v. Wilcox*, 19 Wend. 343; *Richmond Turnpike v. Vanderbilt*, 1 Hill’s (N. Y.) R. 480; *Hibbard v. N. Y. & Erie R. R. Co.*, 1 Smith’s (N. Y.) R. 455, 467; *Tuller v. Voght*, 13 Ill. 277; *Moore v. Sanborne*, 2 Mich. 519; *McCoy v. McKowen*, 26 Miss. 487; *Ingram v. Atkinson*, 4 Texas, 270; *Croft v. Alison*, 4 B. & Ald. 590.

The principles declared in *McManus v. Crickett*, *supra*, have been several times recognized, and, in some cases, made the basis of decision in this court.—*Blackburn v. Baker*, 1 Ala. 173; *Lindsay v. Griffin*, 22 Ala. 629; *Walker v. Bolling*, *ib.* 294; *Kirksey v. Jones*, 7 Ala. 622.

Influenced by these decisions, we feel it our duty to adhere to the rule, and to reverse this case on the charge refused by the court.

There was, at least, some evidence tending to show that the injury was caused by the willful act of those in charge of the steamboat; and it was the right of the defendants to have it passed on by the jury.—Hopper v. Ashley, 15 Ala. 457; Ala. & Tenn. R. R. v. Kidd, 29 Ala. 221, 227.

Several distinctions, in cases of master and servant, have been taken, some of which appear to us to be unsound. We will not consider them in this opinion, as they are not necessary to a correct decision of this case. None of them materially unsettle the great distinction, ruled in *McManus v. Crickett*, between those injuries which are the direct result of intentional or willful fault on the part of the servant, and those which result from his mere carelessness, or want of skill. It seems to be well settled, that if the servant be in the performance of a duty entrusted to him, and, from a want of either skill or diligence, injure another, it will not excuse the master or employer, even if the servant, in the matter complained of, was acting contrary to instructions. Trusting the servant in the given case, is an assumption by the master of all responsibility which results from negligence or want of skill in the servant. But this rule does not apply, when the servant actually wills and intends the injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong. Thus, if an officer, having the control and direction of a steam-engine committed to him, willfully and intentionally perverts its immense power to the damage of others, he alone is responsible; unless, perhaps, in case of want of skill, or known recklessness of the servant, a question may arise as to the liability of one who employs such reckless or unskillful servant. On the other hand, for all damage which is the result (not intended by the officer in charge) of his want of skill, carelessness, or even recklessness, the doctrine is, *respondent superior*.

In the following cases, no question was raised or considered as to the responsibility of the master for willful

or intentional torts committed by the servant. The question was, whether or not the master was liable for injuries caused by the recklessness or unskillfulness of the servant, in cases in which the servant, though not intending injury, had nevertheless disregarded the instructions of the master, or even gone against orders. Such disregard of orders will not excuse the master, unless the servant goes further and intend or will the wrong done.—Phila. and Read. R. R. v. Derby, 14 How. (U. S.) 465, 484-7; Sleath v. Wilson, 9 C. & P. 607; Joel v. Morrison, 6 C. & P. 501; Smith on Mas. and Serv. 151-2; Vicks. and Jack. R. R. v. Patton, 31 Miss. 156, 196-7; Redfield on Railways, 380, 381; Parsons on Contracts, 86-7; Reeves' Dom. Rel. 358; Railroad Co. v. Keary, 3 Ohio St. R. 201, 206-7. See also the following authorities; Echols v. Todd, 20 Texas, 190; Mills v. Ashe, 16 Texas, 295; Henderson v. Railroad Co., 17 Tex. 560; Luttrell v. Hayne, 3 Sneed, 20; Duggins v. Watson, 15 Barber (Ark.) 118; Jones v. Glass, 13 Ired. 305; Lowry v. Ingram, 6 Mees. & Wels. 302; Hegeman v. Western R. R. Co., 16 Barb. (Sup. Ct.) 353.

What we have said above is not intended to impair the liabilities of common carriers.

Whether some of the principles ruled in the case of *McManus v. Crickett*, *supra*, should not be changed, so as to accommodate the relation of master and servant to the very useful, yet terrible motive agent, steam, is a question not for us, but for the legislature.

Reversed and remanded.

DURDEN vs. McWILLIAMS.

[TRIAL OF RIGHT OF PROPERTY IN SLAVE.]

1. *Competency of defendant in execution as witness for plaintiff*.—Under the Code, (§ 2302,) the defendant in execution is a competent witness for the plaintiff, on a trial of the right of property.

2. *Statute of frauds as to three years possession of personal property.*
Section 1295 of the Code, as to three years possession of personal property under a loan, being a re-enactment of the former statute, (Clay's Digest, 255, § 2,) is not confined in its operation to possessions commenced or continued for three years since the Code went into effect; consequently, to enable a creditor of the loanee to subject the property to the payment of his debt, it is not necessary that he should show three years continuous possession before the Code went into effect, or three years continuous possession since that time.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. A. A. COLEMAN.

THIS was a trial of the right of property in a slave, between Alex. K. McWilliams, plaintiff in execution against Washington L. Durden, and Gilly Durden as claimant. The plaintiff's judgment was rendered on the 14th April, 1854; an execution, issued thereon, was levied on the slave here in controversy on the 2d August, 1854; and a claim to the slave was interposed by Mrs. Gilly Durden on the same day. The case was before this court at its June term, 1857, when the judgment of the circuit court was reversed, and the cause remanded.—See 31 Ala. 206. The facts disclosed on the second trial, and the rulings of the circuit court thereon, are thus stated in the bill of exceptions:

“The plaintiff offered in evidence his judgment against the defendant in execution, rendered on the 14th April, 1854, together with the note on which said judgment was founded, given by said defendant on the 17th February, 1853; proved the issue of execution on said judgment, and its levy on the slave Jim, here in controversy, in August, 1854; introduced proof tending to show possession of said slave by said defendant in execution at the time of the levy, and then closed. The claimant then introduced evidence tending to show, that she raised said slave, and owned him in 1849; that she let said defendant in execution, in 1849, have the labor of said slave, reserving to herself the right to resume the possession when she pleased; that the slave returned to her

possession every christmas afterwards; and that she resumed absolute control and possession of said slave in February, 1854, and kept him as hers until the levy of plaintiff's execution. There was evidence, also, tending to show that said defendant in execution hired out said slave in 1850, worked him on his farm in 1851 and 1852, and hired him out again in 1852 and 1853. The plaintiff then offered the defendant in execution as a witness. The claimant objected to his competency. The court overruled the objection, and permitted him to testify; and the claimant excepted.

"The claimant asked the court to charge the jury as follows: 'That in considering the question of three years possession by the defendant in execution, if they find that he had not acquired three years continuous possession up to the 17th January, 1853, then they will consider whether he has had three years continuous possession since said 17th January, 1853; and if they find that he did not have three years continuous possession prior to the 17th January, 1853, and has not had three years continuous possession since that time, then they cannot find for the plaintiff, on the ground that the defendant in execution had had three years continuous possession of said slave, and that the plaintiff's debt was contracted with him on the faith of that possession.' The court refused to give this charge, and the claimant excepted."

The rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

ELMORE & YANCEY, for the appellant.

WATTS, JUDGE & JACKSON, *contra*.

R. W. WALKER, J.—Under the Code, (§ 2302,) it is not a sufficient reason for excluding a witness, that the effect of a judgment in favor of the party who introduces him would be to place him in a state of security. His competency depends upon the question, whether the verdict and judgment would be evidence for him in another suit; and the test whether they would be evidence for him, is the inquiry, would they be evidence against him,

if adverse to the party introducing him? In other words, the witness is competent, unless the verdict and judgment would be evidence for or against him in another suit, according as they may be for or against the party calling him.—Blakey v. Blakey, 33 Ala. 618, and cases cited. As a judgment in favor of the claimant would, as to the defendant in execution, be *res inter alios acta*, and, therefore, could not in any subsequent suit be evidence against him, he was not incompetent.

2. It is not necessary that we should determine, whether there may not be, in some respects, a difference between the provisions of the act of 1803, (Clay's Dig. 255, § 2,) and sections 1294–5 of the Code, regulating the rights of creditors and purchasers of loanees who are suffered to retain possession of personal property for three years. For, however this may be, there is no doubt that the provision which is made in section 1295 of the Code, was fully embraced by the act of 1803. This section, therefore, simply continues in force a principle embodied in, and is, to that extent, a re-enactment, rather than a repeal of, the former statute. Hence, it is not to be confined in its operation to possessions commenced or continued for three years after the Code went into effect, but applies as well to cases in which the three years possession by the loanee is made up in part of time which elapsed before, and in part of time which elapsed after, the Code went into operation.

Judgment affirmed.

BOYNTON vs. McEWEN.

[ACTION BY HEIR, AGAINST ADMINISTRATOR OF INSOLVENT ESTATE, FOR RECOVERY OF RENTS.]

1. *Administrator's authority to rent lands.*—Under the provisions of the Code, (§§ 1737, 1751,) the administrator of an insolvent estate

may rent out the lands belonging to the estate, and receive and hold the rents as assets; consequently, the heir cannot maintain an action against him to recover such rents.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the only child and heir-at-law of James A. McEwen, deceased, against Henry B. Boynton, who was the administrator of said decedent; and was commenced on the 14th October, 1858. The object of the suit was, to recover the rents of a certain house and lot in Cahaba, known as the "Burnett house," which the defendant, as administrator *de bonis non*, had rented out, under an order of the probate court, from the 20th August, 1855, until the 1st February, 1858; which rents the defendant had received, and had expended, before the institution of this suit, in the payment of debts and the expenses of administration. The defendant pleaded the general issue, and the cause was tried on issue joined on that plea. It appeared from the evidence adduced on the trial, that James A. McEwen, the decedent, died on the 12th October, 1853, being then the owner of said house and lot; that letters of administration on his estate were granted, on the 12th November, 1853, to William M. Lapsley, who, after reporting the estate insolvent in November, 1854, resigned his administration in July, 1855; and the defendant was appointed administrator *de bonis non* on the 21st July, 1855. The decedent's widow brought an action against the administrator, to recover the rents of the same premises; and, under the rulings of the circuit court, recovered a judgment for the rents received by the defendant within three years after the decedent's death. From this judgment the defendant took an appeal, and the appeal was pending before the supreme court when the trial was had in this case in the circuit court. On the evidence in this case, all of which is set out in the bill of exceptions, the court charged the jury, that the plaintiff was entitled to recover; to which the defendant excepted, and which he now assigns as error.

D. W. BAINE, with GEO. W. GAYLE, for appellant.
BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—The defendant, being the administrator of an insolvent estate, rented out the land of the estate at public auction, until it was sold under a mortgage, given by his intestate, and appropriated the money received for rent to the discharge of the debts and expenses of administration. The heir sues in this case to recover the rent so collected and paid over; and we decide that the action cannot be maintained.

The Code, in section 1737, devotes the whole property of the decedent, with the exceptions specified in section 1738, to the payment of his debts; and, in section 1751, authorizes the representative to rent the lands of the deceased at public auction, and declares the proceeds of the renting to be assets of the estate. The authority to rent is not here confined to solvent estates; and there is nothing whatever in the Code, from which such restriction of the authority can be inferred. Before the Code was adopted, the authority to rent applied only where the estate was solvent.—Patton v. Crow, 26 Ala. 426; Long v. McDougald, 23 Ala. 413; also, Bank v. Fry, 23 Ala. 770. The statute of 1839, which then gave the authority to rent, was not materially different from the law now in force.—Clay's Digest, 199, § 37. If this court had, before the adoption of the Code, construed that statute so as to confine its authority to the renting of lands of solvent estates, it would have been our duty to regard the re-enactment of the substance of the statute as an adoption of the construction previously given to it, and to have followed that construction. But it is clear that the confinement of the authority to rent to solvent estates was not the result of a construction of the act of 1839, but was the necessary effect of the act of 1822, which made a failure to apply for leave to sell the land of an insolvent estate equivalent to the perpetration of a *devastavit*.—Clay's Digest, 198, § 27. This last named statute was regarded as imperatively requiring the representative to obtain an order and sell the land, when the estate was

insolvent; and being so understood, it necessarily prohibited a renting. That statute, not being carried into the Code, is repealed. The ground upon which the authority to rent the land of an insolvent estate was denied, is thus removed; and we thus have a rather significant indication of an intent to change the law. We certainly have now a general authority to rent, unqualified by any other statute; and no reason occurs to us why an exception as to the lands of insolvent estates should be inferred. There are cogent reasons why the authority to rent should apply to insolvent estates. The title to the land may be involved in litigation, which would render a speedy sale imprudent. The application to sell may itself give rise to a protracted suit, pending which it would be expedient to rent out the land. Or a controversy, as to the amount of debts to be paid, may render it probable that a sale of the entire land will not be necessary, and make it greatly to the interest of the heir that there should be a postponement of the sale and an intermediate renting. Other contingencies may arise in which a renting would be proper. We think, therefore, that there is no reason, growing out of the insolvency of the estate itself, for denying the authority to rent the land belonging to it; and we think the statute, in the legitimate force of its terms, bestows the authority, while it is unqualified by any other provision of our present system.

The judgment of the court below is reversed, and the cause remanded.

SCOGGIN vs. BLACKWELL.

[ACTION ON OPEN ACCOUNT FOR WORK AND LABOR DONE.]

1. *Statute of frauds as to contract not to be performed within one year*
A verbal contract for the performance of services as an overseer

for the term of twelve months, to commence at a future day, is void under the statute of frauds, (Code, §1551, subd. 1;) and a partial performance of it, coupled with a discharge without cause, will not enable the party to recover the stipulated wages after the termination of the twelve months.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Alexander Scoggin, against Francis M. Blackwell, to recover the sum of \$850, alleged to be "due by account on the 1st January, 1859, for work and labor done by plaintiff for defendant, at his request, as an overseer, during the year 1858;" and was commenced on the 6th April, 1859. The defendant pleaded *non assumpsit*, the statute of frauds, former recovery, and payment. "On the trial," as the bill of exceptions states, "the plaintiff proved that in December, 1857, the defendant employed him as an overseer for the year 1858, at the sum of \$800 for said year; that the contract was verbal, and not in writing; that he entered into the defendant's service, as such overseer, on the 1st January, 1858, and discharged his duty as such for twelve days, when the defendant discharged him without sufficient cause. Upon this evidence, the court charged the jury, that the contract for said services was void under the statute of frauds, and that the plaintiff could not recover on said contract, though he might recover for the twelve days' service. The plaintiff excepted to this charge, and requested the court to instruct the jury, 'that although said contract, when made, was void under the statute of frauds; yet, if such contract was made, and the plaintiff afterwards entered into the defendant's service at the time provided for therein, and the evidence satisfies them that he entered into such service under the same terms set forth in said contract, and that the defendant then so understood the matter, and accepted the service with such understanding, and turned the plaintiff off without good cause, then he is bound by the contract as much as if it were in writing.' The court refused to

give this charge, and the plaintiff excepted." In consequence of these rulings of the court, the plaintiff took a nonsuit, which he now moves to set aside; assigning as error the charge given, and the refusal of the charge requested.

GEO. W. GAYLE, for the appellant, contended, that partial performance by the plaintiff, until discharged without cause, entitled him to recover the entire wages stipulated after the termination of the year, although the contract was void under the statute of frauds; citing the following authorities: Rake's Adm'r v. Pope, 7 Ala. 161; Danforth v. Laney, 28 Ala. 275; 6 Vermont, 383; 2 Rawle, 53; 3 Watts & S. 56; 3 J. J. Mar. 489; 13 Pick. 1; 4 Bing. 309; 4 Conn. 568; 10 Wendell, 436; 7 Barn. & Cr. 73; 1 Fairf. 40.

PETTUS, PEGUES & DAWSON, *contra*, cited Crommelin v. Thiess, 31 Ala. 412; Drummond v. Burrell, 13 Wendell, 307; Boydell v. Drummond, 11 East, 155; Chitty on Contracts, 68; Browne on Statute of Frauds, 291-92.

STONE, J.—The contract in the present case was oral, entered into in the month of December, 1857, by which the plaintiff bound himself to serve the defendant in the capacity of overseer, for and during the year 1858. By the very terms of the contract, it was not to be completely performed within one year from the making thereof. So long as the contract remained executory, no action could be predicated upon it for its breach or non-performance.—Code, § 1551, subd. 1; Browne on Stat. Frauds, 292; Chitty on Contr. 67-8; Crommelin v. Thiess, 31 Ala. 412; Boydell v. Drummond, 11 East, 142, 155; Drummond v. Burrell, 13 Wendell, 307; Craig v. Vanpelt, 3 A. K. Mar. 489; Philbrook v. Belknap, 6 Vermont, 383.

The ruling of the circuit court is correct, and its judgment is affirmed.

CALLOWAY vs. GILMER.

[BILL IN EQUITY BY INFANT HEIRS, TO SET ASIDE PURCHASE BY EXECUTOR
AND GUARDIAN AT HIS OWN SALE.]

1. *Purchase by trustee at his own sale; when set aside in equity.*—The defendant having married the complainants' mother, who was at the time their guardian by appointment from the probate court, and also executrix of their deceased father's will; and having afterwards procured from the probate court, as executor in right of his wife, an order for the sale of the decedent's real estate, which was devised to the complainants jointly with their mother; and having himself become, through an agent, the purchaser at the sale,—the sale was set aside at the instance of the infant devisees, although no fraud, unfairness, or inadequacy of price was shown.

APPEAL from the Chancery Court at Montgomery.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed, on the 31st May, 1858, by Peachy R. Gilmer and Fleming M. Gilmer, infants suing by their next friend, against Willis R. Calloway, Mary E. Calloway, his wife, Samuel B. Marks, F. W. Jordan, and Jere. Lamar; and sought to set aside a sale of certain real estate, which was made by said Calloway and wife, as executor and executrix of the last will and testament of Robert G. Gilmer, deceased, under an order of the probate court, on the 4th December, 1854. The complainants were the only children and heirs-at-law of said Robert G. Gilmer, who died in the early part of the year 1853, and by whose last will and testament, which was duly admitted to probate after his death, the lands now in controversy were devised, in the event of the second marriage of his widow, to her and the complainants, to be divided equally among them. The testator's widow duly qualified as executrix of his will, and also as guardian of the complainants, and afterwards married the

defendant Calloway. In September, 1854, Calloway and wife, as executor and executrix, procured from the probate court an order for the sale of the lands, on the ground that they could not be equitably divided among the devisees. At the sale, Jere. Lamar became the purchaser, under an agreement with Calloway that he would buy it for the latter. The sale was confirmed by the probate court, and the executor and executrix were ordered to make a deed to Lamar, who was reported by them to be the highest and best bidder, and to have paid the purchase-money; and a conveyance was accordingly executed by them to Lamar, who, on the 19th December, 1855, conveyed the lands, by deed without warranty, to Calloway. No part of the purchase-money was in fact paid by Lamar; but Calloway and wife, on settlement with the probate court as executor and executrix, were charged with the whole amount, while the complainants' portion was decreed to them as guardians. Marks and Jordan were joined as defendants, on the ground that Calloway had resold a portion of the land to each of them, at an advanced price.

On final hearing, on pleadings and proof, the chancellor dismissed the bill as to the defendant Marks: confirmed the sale by Calloway to Jordan, as if made in trust for the complainants; set aside Calloway's sale and purchase of the lands remaining unsold by him, and ordered a reference of the matters of account,—directing the master to charge Calloway with two-thirds of the rents of the entire tract of land, up to the time of his sales to Marks and Jordan respectively, and with two-thirds of the purchase-money received by him from them, and to credit him with the amount paid for taxes on the lands, and with the value of permanent improvements erected by him. From this decree Calloway now appeals, and here assigns it as error.

WATTS, JUDGE & JACKSON, for appellant.—1. Calloway, being executor in right of his wife, and thereby having an interest in the testator's estate, had the right to purchase at his own sale.—*Brannan v. Oliver*, 2 Stewart, 47;

Saltmarsh v. Beene, 4 Porter, 283; McLane v. Spence, 6 Ala. 804; Julian v. Reynolds, 8 Ala. 681; McCartney v. Calhoun, 17 Ala. 301; Charles v. Dubose, 29 Ala. 367. No fraud or unfairness in the sale is asserted, and the proof shows that the lands brought their full market value at the time.

2. The fact that Calloway, at the time of the sale, was guardian of the complainants in right of his wife, cannot affect his right to purchase at the sale. He made the sale as executor, and not as guardian; and no part of the lands had then been assigned or set apart to the complainants, or to Calloway and wife as their guardians. Where the offices of executor and guardian are united in the same person, he holds the estate in his hands as executor, and does not hold anything as guardian which is not separate from the assets of the estate, or placed to his account as guardian.—Davis v. Davis, 10 Ala. 299–300.

SAFFOLD & ARRINGTON, *contra*.—It is admitted, that the sale was made by Calloway and wife as executor and executrix; and that all the formalities of the statute, regulating sales by executors and administrators, were complied with; but it is insisted, that Calloway has not brought himself within the exception to the general rule established by several decisions of this court, on the authority of Brannan v. Oliver, 2 Stewart, 47. Although that case has never been overruled, its correctness has been frequently questioned, and an intention declared not to extend the exception to the general rule which forbids a purchase by a trustee at his own sale.—McCartney v. Calhoun, 17 Ala. 303; Andrews v. Hobson, 23 Ala. 236; Montgomery v. Givhan, 24 Ala. 585; Saltmarsh v. Beene, 4 Porter, 283.

1. Calloway did not have such an interest in the estate or lands as, under the established exception, authorized him to purchase at his own sale. His only interest was as husband and trustee of the testator's widow, to whom the lands were devised jointly with the complainants, and whose interest therein belonged to the *corpus* of her

separate estate. He is within neither the letter nor the reason of the exception.

2. The exception has never been extended to sales of realty; and the early cases in Virginia and Kentucky, on which it was at first partly based, have been since overruled, so far as regards sales of real estate.—*Moore v. Hilton*, 12 Leigh, 28; *Bailey's Adm'r v. Robinson*, 1 Grattan, 4; *Grider v. Payne*, 9 Dana, 188. In South Carolina, the exception never has been extended to sales of real estate.—*Stallings v. Freeman*, 2 Hill's Ch. 401-09.

3. The evidence shows that the land did not bring its full value at the sale. The average price per acre was \$7 98; while the complainants' witnesses fix the average value at \$9 68, and the defendant's at \$8 50; making a difference in the aggregate of over \$1,000, according to the defendant's own witnesses. Moreover, it appears that the purchase was not made with Calloway's own means or credit, and that neither he nor Lamar ever paid anything.—*McCartney v. Calhoun*, 17 Ala. 304; *Julian v. Reynolds*, 8 Ala. 680; *Montgomery v. Givhan*, 24 Ala. 584; *Mosely v. Lane*, 27 Ala.

4. In considering the validity of the defendant's purchase, he is not to be regarded in the capacity of executor only; being at the time, by virtue of his marriage, the guardian of the complainants jointly with his wife.—*Carlisle v. Tuttle*, 30 Ala. 613. As guardian, it was his duty to represent and protect the interests of his wards; and he could not become the purchaser of their property, either at a judicial sale under adverse process, or at a sale made by himself in another capacity.—*Chapin v. Weed*, 1 Clarke's Ch. 464; *Everton v. Tappan*, 5 John. Ch. 498; *Campbell v. Johnson*, 1 Sandf. 148; *Torrey v. Bank of Orleans*, 9 Paige, 653; 7 Hill, 260; 7 Watts, 412; 7 Gill & John. 2; 2 Gill, 164; 9 Paige, 238. These authorities establish the proposition, that the disqualification attaches to the fiduciary character, independent of the mode of sale.

R. W. WALKER, J.—No principle is more firmly established in the equity jurisprudence of this country,

than that a purchase by a trustee, for his own benefit, at a sale of the trust property, is voidable at the option of the *cestui que trust*, and will be set aside, if application for that purpose be made in a reasonable time; and it makes no difference in the application of the rule, whether the purchase be direct or indirect, in person or through an agent, or by the medium of a person who subsequently reconveys to the trustee.—*Davone v. Fanning*, 2 Johns. Ch. 252; *Cunningham v. Rogers*, 14 Ala. 147; *McCartney v. Calhoun*, 17 Ala. 301; *Andrews v. Hobson*, 23 Ala. 219; *Montgomery v. Givhan*, 24 Ala. 584; *Charles v. Dubose*, 29 Ala. 369; 1 *White & Tudor's Lead. Cases*, (3d ed.) 209, 212, and cases cited.

To this eminently wise and conservative principle, the previous decisions of this court require us to recognize a single exception—that is, that such executors and administrators *as have an interest in the property sold*, may purchase at a sale of the goods of the estate, provided there is no unfairness, and the property is exposed to sale in the ordinary mode, and under such circumstances as will command the best price.—*Brannan v. Oliver*, 2 Stewart, 47; *Saltmarsh v. Beene*, 4 Porter, 283, 295; *McLane v. Spence*, 6 Ala. 894; *Julian v. Reynolds*, 8 Ala. 680, 683; *McCartney v. Calhoun*, 17 Ala. 301; *Andrews v. Hobson*, 23 Ala. 235–6; *Montgomery v. Givhan*, 24 Ala. 579, 584–5; *Charles v. Dubose*, 29 Ala. 371. The existence of this exception has, more than once, been regretted by our predecessors, and a determination manifested to extend it no further.—*McCartney v. Calhoun*, *supra*; *Andrews v. Hobson*, *supra*; *Montgomery v. Givhan*, *supra*. We are not, however, disposed to assent to the argument of the appellees' counsel, that the right of the executor or administrator who has an interest in the property sold, must be confined to personal estate; and in the view we take of this case, we are relieved from the necessity of considering, whether an executor or administrator, whose wife is one of the legatees, devisees, or distributees of the property sold, has such an interest as brings him within the exception referred to. Before Calloway's marriage with the widow, she had been appointed guardian

of the complainants; and the effect of her subsequent marriage was to make her husband co-guardian, as well as co-executor with her, during the coverture.—*Carlisle v. Tuttle*, 30 Ala. 624. Hence, in considering the validity of the purchase made by the appellant, he is to be regarded, not only in the capacity of executor, but also in his character as guardian of the complainants.

The rule which holds the purchase of the trust property by a trustee to be voidable at the election of the *cestui que trust*, applies in all its force to guardians, and the disqualification attaches to the fiduciary character, independent of the mode of sale; the incapacity extending as well to judicial or other sales under adverse proceedings, as to those made by the guardian under his powers as such. *Scott v. Freeland*, 7 S. & M. 410; *Patton v. Thompson*, 2 Jones' Eq. 285; 1 *White & Tudor's Lead. Cases*. (3d. ed.) 209, 213, 215-16, and cases cited. Hence, the simple fact that the sale, at which Calloway purchased, was made by him as executor, and not as guardian, does not, of necessity, relieve him from the influence of the disabling rule.

It is said, however, that "when the offices of executor and guardian are united in the same person, he holds the estate in his hands as executor, and does not hold anything as guardian which is not separate from the assets of the estate, or placed to his account as guardian," (*Davis v. Davis*, 10 Ala. 299-300;) and hence, it is argued, that the trust for complainants, with which the defendant was clothed in his capacity as their guardian, did not extend to the lands sold by him as executor, or in any way impair his right to purchase at that sale. But we think that the argument proceeds upon a mistaken view of the foundation and extent of the rule which disables a trustee from purchasing the trust property. No person can become a purchaser of an interest in property, where he has a duty to perform which is inconsistent with the character of a purchaser; in other words, where a person stands in the situation of a trustee for others, and bound as such to protect the general interests of those for whose benefit the trust was created, in regard to the subject of the sale, he is incapacitated from purchasing for his own

benefit, no matter by whom, or under what proceeding the sale is made.—*Torrey v. Bank of Orleans*, 9 Paige, 650, 763; 1 *White & Tudor's Lead. Cases*, (3d ed.) 209–10, 215, 92; *Van Epps v. Van Epps*, 9 Paige, 238, 241.

If Calloway had made the sale as guardian, no one can doubt that it would be set aside. We do not see any sound principle, on which the mere fact that he sold as executor, and not as guardian, can be held to change the result. The property sold was none the less the property of his wards, because it was in his hands as executor, and not as guardian. The proceeds of the sale were, as he knew, a part of the fortune of his wards, and destined to pass into his possession as their guardian. It was the interest of his wards, as he well knew, that the property should bring the highest price which could be obtained for it; whilst it was his interest as a purchaser, buying it on his own account, to bid it in at the lowest sum for which he could get it. Benefit to the guardian, and injury to his wards, would thus keep even pace. Surely, that is a low view of the legal duty of a guardian, which would authorize him to place himself in a situation where it becomes his personal interest that the property which belongs to his wards should be sold at a price below its real value. The very object of the disabling rule is to prevent any such conflict between the fiduciary duties and personal interest of the trustee.

Again; the defendant, as executor, had as many advantages of superior information as to the situation and value of the land, and as much control of the sale, as he would have had if the property had been held and sold by him as guardian. The superior knowledge which a trustee has the means of acquiring, as to the condition and value of the property, and the power he has to control or affect the sale, occupy a prominent place among the reasons for the rule which disqualifies him from purchasing at his own sale of the trust property.—*Ex parte Lacey*, 6 Vesey, 625; *Ex parte James*, 8 Vesey, 337; 1 *White & Tudor's Lead. Cases*, (3d ed.) top pp. 198–9, 201, 208, 217. Upon principle, therefore, it seems to us that, where the same person is executor of the will and

guardian of some of the devisees, he is incapacitated from purchasing the property, an interest in which is devised to his wards, although the sale is made by him in his capacity as executor, and not as guardian, and although he may have such an interest in the property as, under our decisions, would give him the right to become the purchaser, if he occupied no other fiduciary relation towards the persons to be affected by the sale, than that of executor of the deviser.

In *Campbell v. Johnson*, (1 Sandf. 148,) a testator appointed two persons his executors, and the guardians of his children, and devised all his estate to them, in trust to sell for the benefit of his heirs. The land was subject to mortgages given by the testator, under one of which it was sold, and one of the executors purchased. The court held, that the sale must be set aside on the application of the heirs, upon the ground that, in both capacities—as trustees to sell, and as guardians of the children—the executors had a duty to perform in regard to the property, which rendered it inequitable for either of them to become a purchaser.—See, also, *Evertson v. Tappen*, 5 Johns. Ch. 498, 514; *Torrey v. Bank of Orleans*, 9 Paige, 650; *Richardson v. Spencer*, 18 B. Monroe, 450.

Moreover, it appears that Lamar bid off the land for Calloway, under an agreement that it should be subsequently reconveyed by him to Calloway; and that although the executor and executrix reported to the probate court that Lamar had paid the purchase-money, and thereupon obtained an order to make titles to him, yet, in point of fact, no part of the purchase-money was ever paid by Lamar; and that Calloway himself has made no *actual* payment of the money; but he and his wife, as executor and executrix, were debited with the entire amount, on settlement in the probate court, and the portion to which the complainants were entitled was decreed to Calloway and wife as their guardians, and charged against them in their accountings as such guardians. These facts bring the defendant very near, if not within, the line of disability which incapacitates a party from becoming a purchaser for his own benefit, with the means, or on the

credit, of the estate he represents, or the ward of whom he is guardian.—See *McCartney v. Calhoun*, 17 Ala. 301; *Montgomery v. Givhan*, 24 *ib.* 584; *Mosely v. Lane*, 27 *ib.* 62.

It is proper to remark, that the defendant is not shown to have been guilty of any intentional fraud; nor does the testimony convince us, that the price at which the land was sold was not its full value at that time. But the rule against purchases of trust property by trustees is inflexibly applied, without regard to the consideration paid, or the honesty of the intent. "It matters not that there was no fraud contemplated, and no injury done: the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." "The sale is set aside, not because there is, but because there may be fraud."—1 *White & Tudor's L. C.* 210, and cases cited; *Brothers v. Brothers*, 7 *Ired. Eq.* 156; *Saltmarsh v. Beene*, 4 *Porter*, 283, 293.

There is no error in the decree, of which the appellant, Calloway, can complain, (see 7 *Rich. Eq. R.* 34, 44; 1 *White & Tudor's L. C.* 217–18–19,) and it must be affirmed, at his costs.

BARBOUR COUNTY vs. BRUNSON.

[ACTION AGAINST COUNTY FOR NEGLIGENCE.]

1. *Statutory liability of county for damages caused by fall of public bridge.*—Under the provisions of the Code, (§ 1203,) an action lies against a county, to recover damages sustained from the fall of a bridge after the expiration of the period covered by the builder's guaranty, although no toll was charged at the bridge.

APPEAL from the Circuit Court of Barbour.

The record does not show who was the presiding judge.

THE complaint in this case was as follows:

“Marion A. Brunson } The plaintiff claims of the de-
vs. } fendant the sum of \$2,000, as

Barbour County. } damages for injuries sustained by
him in the loss of his property occasioned by the falling
in of a bridge, which had been constructed by contract
with the court of county commissioners of said county,
over a stream known as ‘Hodge’s mill creek,’ on the pub-
lic highway in said county from Eufaula to Midway; said
court of county commissioners having taken a guaranty
by bond from the builders of said bridge that it should
continue safe for the passage of travelers and other per-
sons for the period of — years, which said period had
elapsed; and although it had elapsed, said bridge was
allowed to stand, in a neglected and unsafe condition,
until the — day of August, 1859, when, as plaintiff’s
wagon and team were passing over it, said bridge fell in,
and killed a negro man and a mule, the property of plain-
tiff, and injured his wagon and harness, damaging him in
the sum of \$2,000; for which damages plaintiff applied,
in the terms of the statute, to the court of county com-
missioners for payment; but being by said court refused,
he brings this action, and demands of said county his
damages aforesaid, together with interest thereon.

“Also, the like sum of \$2,000, for damages sustained
in the loss of property destroyed and injured by the fall-
ing of a public bridge, kept up by said county over a
stream on a public highway in said county, to-wit, in
August, 1859; the said county being bound to keep said
bridge in a safe condition for the passage of the public,
and by its failure to do so is responsible to plaintiff for
the damages which he has sustained by reason of said
neglect.

“Also, the like sum of \$2,000, as damages which he has
sustained by reason of the negligence of the court of
county commissioners of said county, for that heretofore,
to-wit,” &c., “the said court of county commissioners,
by virtue of the jurisdiction given to it, did contract with
certain parties, and authorize them to build a bridge
across Hodge’s mill creek in said county, on the public
highway leading from Eufaula to Midway, requiring said

contractors to give bond to guaranty the safety of said bridge for the period of — years; and the said period having elapsed, it became the duty of the said court to keep the said bridge in a safe condition for the passage of the public; but, not regarding their duty, the said court neglected to keep said bridge in good repair, but permitted it to become unsafe and dangerous, so that plaintiff, on the — day of August, 1859, passing over and upon said bridge, as he had a right to do, and said bridge (a part of said highway) having become rotten and unsafe by reason of said neglect, while plaintiff's wagon and team were passing over it, fell through, and was broken down; whereby a negro man and a mule, the property of plaintiff, were killed, and the wagon and harness were broken, damaging the plaintiff to the amount of \$2,000, as aforesaid; which said damages the said court of county commissioners, though requested so to do, have hitherto refused to pay; wherefore plaintiff sues," &c.

The case was submitted to the decision of the court below on the following agreed statement of facts: "It is admitted, that the facts set forth in the plaintiff's complaint, not inconsistent with anything herein stated, are true; that the negro and mule killed were worth \$1,700, and the wagon and harness damaged to the extent of \$10; and that if the plaintiff is entitled to recover at all, he shall recover \$1,710. It is admitted, also, that the bridge was built within the body of the county, and not on a county line, by order of the court of county commissioners, by contract; that the bond given by the contractors had expired; that the bridge was free, the defendant having never charged or intended to charge any toll, and the plaintiff having never paid or offered to pay any toll; that the plaintiff's demand was regularly presented to the court of county commissioners, within twelve months after the damage was sustained, and that payment of the same was refused by said court. Each party reserves the right of appeal to the supreme court."

On these facts, the court rendered judgment for the plaintiff; and its judgment is now assigned as error.

JEFF. BUFORD, for appellant.

WM. H. CHAMBERS, *contra*.

A. J. WALKER, C. J.—Section 1203 of the Code is in the following words: “When a bridge or causeway has been erected by contract with the county commissioners, with a guaranty, by bond or otherwise, that it shall continue safe for the passage of travelers and other persons for a stipulated time, any person injured in person or property, before the expiration of such period, by a defect in such bridge or causeway, may sue in their own name on the bond or other guaranty, and recover damages for the injury; and if no guaranty is taken, or the period has expired, may sue and recover damages of the county.”

It is perfectly clear, that this section, in its literal import, gives a remedy for the complainant's injury against the county. But it is contended, that the bridges and causeways referred to must be understood to be toll bridges and causeways. In support of this position reference is made to the fact, that section 1203 is a part of an article, the caption of which indicates that “toll bridges, causeways, and ferries,” are the only subjects within its purview. It is a satisfactory reply to this argument, that section 1190, in the same article, is not susceptible of any application to toll bridges, causeways or ferries, and that the article is, therefore, clearly not restricted to the subjects mentioned in the caption.

But we think a comparison of section 1203 with other provisions of the Code, shows that its reference is not to toll bridges and causeways. Section 1203 very clearly relates to bridges and causeways built by contract. The 5th division of section 1159, and the latter clause of section 1189, show it to have been contemplated that the court of county commissioners should have bridges built by contract with the county funds. To the bridges and causeways thus built section 1203 has a very obvious application. Section 1189, which is in the same article with section 1203, authorizes the court of county commissioners to establish toll bridges, causeways and ferries, in the manner afterwards provided. Section 1191

prescribes the manner in which the toll bridges, causeways, and ferries are to be established. The manner prescribed is, to license persons to establish ferries, causeways and bridges, to fix the rates of toll, and to require bond, with surety, of specified condition. Bridges and causeways, established by this section, are the toll bridges and causeways which the county commissioners are authorized to establish. They are clearly not the bridges and causeways referred to in section 1203, because they are not erected by contract with the county commissioners, as are those mentioned in 1203, and because they can not be erected under any other guaranty than that of the prescribed bond; while those mentioned in section 1203 may be erected under a guaranty by bond or otherwise. But there is still another consideration, which tends very strongly to show that the toll bridges and causeways mentioned in section 1191 are not the bridges and causeways mentioned in section 1203. Section 1197 prescribes the remedy on the bond given under section 1191; and if section 1203 refers to the same bridges and causeways, a remedy upon the same bond is prescribed the second time, and the legislature is convicted of inserting a vain and useless provision in a code which was designed to be consistent and concise.

After a careful examination and study of all the statutes bearing upon the subject, we can find no reason for giving to section 1203 a construction variant from the natural import of its language; and we are constrained to hold, that the Code has, in that section, prescribed the remedy adopted in this case for an injury sustained under the circumstances set forth in the statement of facts agreed upon.

We do not controvert the argument of appellant's counsel, that the authority which the court of county commissioners exercise over the subject of roads and bridges is governmental in its character, and that the county would not, upon common-law principles, be liable for any injury which might result from the failure to exercise that authority in a manner the most conducive to the safety of the public. But the legislature has

unquestionably the power to impose such liability; and we think they have done so, to the extent necessary to sustain the ruling of the court below.—*Smoot v. Wetumpka*, 24 Ala. 112; *Gilmer v. City Council of Montgomery*, 32 *ib.* 116; *Dargan v. Mayor, &c.*, 31 *ib.* 469.

As it was unnecessary, we have not considered the question, whether the ruling of the court below can be revised upon the record before us, there being no bill of exceptions.

Judgment affirmed.

KNOX vs. KING.

[ACTION BY VENDOR, AGAINST PURCHASER AT AUCTION SALE, FOR DAMAGES.]

1. *Statute of frauds as to sale of lands; memorandum of sale by auctioneer.*—Where lands are sold at auction, and the entry on the auctioneer's book does not show the name of the person on whose account the sale is made, nor refer to any other writing in which the name is stated, the sale is void under the statute of frauds, (Code, §§ 1551-52,) and the defective entry cannot be aided by parol evidence.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Charles B. King, against Dean Knox, to recover damages for the defendant's failure to comply with the terms of a contract for the purchase of certain real estate in the city of Mobile, which the plaintiff had sold at auction, and which was knocked down at the sale to the defendant, at the price of \$1050; and, on his failure to comply with the terms of the sale, was resold by the plaintiff, and brought only \$525; the amount sued for being the difference between the prices at the first and second sales. The defendant pleaded the

general issue, the statute of frauds, and several special pleas.

"The only evidence of a contract in writing," as the bill of exceptions states, "consisted of an entry by the auctioneer's clerk, in the book of sales, wherein was posted the advertisement of the property, and opposite to said advertisement, in these words: 'Dean Knox, \$1050'; but no mention was made of the person for whom the sale was made, either in the advertisement, or in the said memorandum. To show a compliance with the statute of frauds, the plaintiff proposed to call the auctioneer's clerk, and to permit him then to add to the entry the words, 'Charles B. King.' The court allowed this amendment to be made, against the defendant's objection, and then permitted the amended entry to be read to the jury; to which rulings of the court the defendant excepted."

The auctioneer's advertisement stated, that maps of the land could be seen at his office. The court permitted the plaintiff to prove, by the parol testimony of the auctioneer's clerk, that a map was posted up in the auctioneer's room, in which the plaintiff's name was written as the owner of the said lands; that the defendant inspected this map, prior to the sale, and was then informed by the witness that the property belonged to the plaintiff; and that the auctioneer exhibited this map at the sale, and held it in his hand; but it was not shown by whom, or by whose authority, the plaintiff's name was written on this map; nor was it in any manner identified as the map referred to in the advertisement. The defendant objected to the admission of each portion of this evidence, and reserved exceptions to the overruling of his several objections." It appeared that the defendant had paid no part of the purchase-money. There was no conflict in the evidence, and no dispute about any of the facts of the case."

"The defendant requested the court to instruct the jury—1st, that the plaintiff could not recover on the evidence; 2d, that there was no such memorandum in writing as the law requires to make the contract binding; 3d,

that the plaintiff cannot recover, if the defendant has not paid any part of the purchase-money; and, 4th, that the addition to the memorandum, made by the auctioneer's clerk at the trial, cannot be considered by them, and, without it, the contract is void under the statute of frauds. The court refused each of these charges, and the defendant excepted."

The rulings of the court on the evidence, and the refusal of the several charges asked, are now assigned as error.

R. H. SMITH, and WM. BOYLES, for appellant, cited *Perry v. Calhoun*, 8 Humph. 551; *Adams v. McMillan*, 8 Porter, 73; *Robinson v. Garth*, 6 Ala. 204.

GEO. N. STEWART, *contra*, contended, that the written memorandum was, of itself, a sufficient compliance with the statute; and that the parol evidence, in aid of it, was admissible; and cited the following authorities: 1 Suggden on Vendors, 154, 127, 136, 138; Story on Contracts, § 784; Addison on Contracts, 40-42; *Dobell v. Hutchinson*, 3 Ad. & El. 372; *Jackson v. Lowe*, 1 Bingham, 9; *Saunderson v. Jackson*, 2 Bos. & P. 237; *Boydell v. Drummond*, 11 East, 142; 3 Mer. 60; 5 Esp. 192; *Pugh v. Chesseldine*, 11 Ohio, 109; 4 Greenl. 258; 2 M. & S. 289.

STONE, J.—Under the English statute of frauds, it has been frequently held, that a contract for the sale of lands may be taken out of the operation of the statute, by an acknowledgment of its terms in writing, though subsequently made; and it does not vary the case, if the terms are to be gathered from two or more papers, provided the *terms of the contract* are expressed in the writing. But, when the memorandum in writing is itself incomplete, it can not derive aid from another writing, unless the memorandum refer to the other writing. Oral evidence can not be received to connect the two, or to supply the wanting link; for this would let in all the mischiefs which the statute of frauds and perjuries was intended to prevent.—2 Kent's Com. 511, in margin; *Parkhurst v.*

Van Cortlandt, 1 Johns. Ch. 280; 2 Story on Cont. § 784, and note 6; 3 Phil. Ev. (by Edwards,) 350, 351; Dobell v. Hutchinson, 3 Ad. & El. 355, 371-2; Addison on Cont. 42; Shippey v. Derrison, 5 Esp. 190.

Under our general statute of frauds, (Code, § 1551,) contracts for the sale of lands, &c., unless the purchase-money or a portion thereof be paid, and the purchaser be put in possession by the seller, are void; unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or by some other person thereunto lawfully authorized in writing.

In the present case, there is no pretense that the contract is binding under section 1551 of the Code. It is urged, however, that the plaintiff has brought himself within the exceptional section 1552 of the Code, which provides, that when lands, &c., are sold at public auction, and the auctioneer, his clerk, or agent, makes a memorandum of the property and price thereof at which it was sold or leased, the terms of sale, the name of the purchaser or lessee, and the name of the person on whose account the sale or lease is made, such memorandum is a note of the contract, within the meaning of the preceding section. The memorandum in this case makes no mention of the name of the person on whose account the sale was made. An attempt was made in the court below to supply this defect, by proof that a map was exhibited, both before and during the sale, which contained the name of the person on whose account the sale was made. This map can not be in any way connected with the memorandum, without resort to oral proof, which would let in all the mischiefs against which the statute of frauds and perjuries was intended to provide. The memorandum was insufficient.—Adams v. McMillan, 7 Porter, 73; Robinson v. Garth, 6 Ala. 204; Hutton v. Williams, 35 *ib.* 503.

The deed and mortgage, drawn up at the instance of Mr. Knox, and by his attorney, can not aid the plaintiff's case. They were not signed by Mr. Knox, nor by any

person thereunto authorized in writing. Neither can the amendment of the memorandum, made pending the trial, perfect the plaintiff's right of action.

Reversed and remanded.

TENNESSEE AND COOSA RAILROAD COMPANY *vs.* MOORE.

[MANDAMUS BY RAILROAD COMPANY AGAINST GOVERNOR.]

1. *Against whom mandamus lies.*—A *mandamus* lies against the governor of the State, as well as any other public functionary, to compel the performance of a purely ministerial duty enjoined by statute.
2. *And when.*—Where a sum of money is loaned by act of the legislature to a railroad company, on its complying with certain terms and conditions in said act prescribed: and the governor is required, on the performance of these conditions by the company, to accept its bond for the faithful application and repayment of the money, and to draw his warrant in its favor, on the custodian of the fund, for the sum thus loaned,—a *mandamus* will lie to compel the performance by the governor of this ministerial duty, since an action for damages, if it could be maintained, would not afford adequate and complete redress.
3. *Constitutionality of statute loaning two and three per cent. funds to railroad companies, and imposing additional restrictions on loan authorized by former statute.*—The act of February 17, 1854, “to aid the Tennessee and Coosa railroad,” (Session Acts 1853-4, p. 280.) having been accepted and acted on by the said railroad company, by the completion of portions of its road, and the letting out of contracts for the completion of the residue within the time required by said act, it was not competent for the legislature, by the subsequent act of February 24, 1860, (Session Acts 1859-60, p. 110,) to impose additional limitations on the loan authorized by the former act; nor can the latter act operate as a revocation of the authority conferred on the governor by the former; consequently, said railroad company is entitled to receive from the public treasury the sums loaned by the former act, on its performance of the conditions therein specified, without a compliance with the additional requisitions of the latter act.
4. *Construction of act of February 17, 1854, “to aid the Tennessee and*

Tennessee and Coosa Railroad Co. v. Moore.

Coosa railroad.—The act of February 17, 1854, entitled "An act to aid the Tennessee and Coosa railroad," (Sess. Acts 1853-4, p. 280,) is not void for uncertainty; the portion of the two and three per cent. funds therein specified, is advanced to the railroad company as a loan, and not as a gift; and the company is bound, in the absence of subsequent legislation as to the terms of payment, to repay the sum so loaned, in cash, within ten years, without interest for four years, and with interest at five per cent. *per annum* after four years.

5. *Remandment of cause on reversal.*—On the reversal of a judgment of the circuit court, rendered on demurrer to evidence, or on an agreed state of facts, the cause will be remanded.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS was an application by the appellant, a corporation chartered by act of the legislature of this State, approved on the 16th January, 1844, (Session Acts 1843-4, p. 170,) for a rule *nisi* against the governor of the State, to show cause why a peremptory *mandamus* should not be issued, commanding him to draw his warrant on the comptroller or treasurer of the State, in favor of the petitioner, for a certain portion of the two and three per cent. funds, claimed by the petitioner under an act of the legislature hereinafter set out, and to accept from the petitioner a certain bond and mortgage tendered under the provisions of the same act. The act under which the petitioner claimed the money, and the subsequent act under which the governor justified his refusal to draw his warrant in its favor, are in the following words:

"*An Act to aid the Tennessee and Coosa Railroad.* Approved February 17, 1854.

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened,* That two hundred and fifty thousand dollars of the three per cent. fund, and one-half of the unappropriated part of the two per cent. fund, be, and the same are hereby, loaned or advanced to the Tennessee and Coosa Railroad Company, upon the terms, limitations and restrictions hereinafter named—that is to say, that when said company

shall have completed, ready for laying down the iron rails, one-fifth part of the grading and local work of said road, and shall produce to the governor of the State satisfactory evidence thereof, and that the same has been completed in a substantial, permanent and durable manner, then the said company shall be entitled to receive one-fifth of two hundred and fifty thousand dollars of the three per cent. fund and one-fifth of the two per cent. fund hereby appropriated, and so in proportion of every fifth part of said road so graded and prepared, until the whole road is completed, upon their executing in due form a bond or bonds, payable to the governor of the State of Alabama and his successors in office, for the payment in manner as hereinafter provided [of] the sum or sums received under this act, and that the same shall be honestly and faithfully applied to the construction of said road, and that said road shall be completed within ten years from the passage of this act, [and] that if repayment be made in cash, it shall be made within ten years, with interest at five per cent. *per annum* after four years; which bonds shall be secured to the entire and full satisfaction of the governor, by personal security, mortgage, or otherwise, as he may require; and upon execution and delivery to the governor [of] the bond or bonds of the company as herein required, he shall issue his warrant on the treasurer, bank-commissioner, or other officer or person having the custody of said two and three per cent. funds, or any portion of them, for the sum or sums to which said company may be entitled under this act, and the same shall be paid to said company by such officer or person having the custody of the funds as aforesaid.

“SECTION 2. *Be it further enacted*, That the funds hereby appropriated shall not be liable for, or applied to, the payment of any debt created before their reception by the company.

“SECTION 3. *Be it further enacted*, That the funds received under this act shall be applied to the construction of said road; and if said fund so received shall be misapplied, the president and directors, and other officers of said company who sanction or assent in such misapplica-

tion, shall be deemed guilty of a misdemeanor, and, upon conviction thereof upon indictment, shall be punished by fine and imprisonment, one or both, at the discretion of the jury trying the same; and shall, moreover, be personally liable in their private property to the State for the amount of the fund so misapplied. *And provided further*, that nothing herein contained shall suspend or take precedence of any appropriation heretofore made to any railroad or plank-road in this State; but such appropriation shall be first provided for, before any money or moneys shall be paid under this act.

"SECTION 4. *Be it further enacted*, That if said company does not grade one-fifth of said road in two years, then said road shall not be entitled to the provisions of this act.

"SECTION 5. *And be it further enacted*, That when one-fifth part of said road is fully completed, the said company shall execute a mortgage deed upon the part so finished, to the satisfaction of the governor, before receiving the amount appropriated by this act for the next fifth part; and so on successively upon every fifth part as completed."—Session Acts of 1853-4, pp. 280-82.

"An Act to loan a part of the three per cent. fund to the Union Town and Jackson, Selma and Gulf, and Cahaba, Marion and Greensboro' Railroad Companies. Approved February 24, 1860.

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened*, That of the sum of two hundred and fifty thousand dollars of the three per cent. fund, loaned to the Tennessee and Coosa Railroad Company by an act approved 17th February, 1854, when the same shall have become due by the terms of said act, and shall have been paid, there shall be loaned, on the terms and conditions hereinafter provided, to the Union Town and Jackson Railroad Company the sum of one hundred and fifty thousand dollars, and to the Selma and Gulf Railroad Company the sum of one hundred thousand dollars.

"SECTION 2. *Be it further enacted*, That said loans shall be made for ten years after the money thereon shall be

received by said railroad companies, and shall bear interest at the rate of five per cent. *per annum* after four years.

"SECTION 3. *Be it further enacted*, That before the money on said loans shall be obtained by said railroad companies, they shall each be required to execute a bond, in double the amount of the loan obtained by them respectively, conditioned for the faithful repayment of the loan so obtained by each, with the interest thereon, and shall give a mortgage on each of said roads, and all its fixtures and franchises, and shall, in addition, give such personal security as the governor shall deem necessary and proper to secure the faithful and punctual repayment of said loans, together with the interest thereon provided for.

"SECTION 4. *Be it further enacted*, That there shall be loaned to the Cahaba, Marion and Greensboro' Railroad Company, out of the first interest accruing on the said loan to the Tennessee and Coosa Railroad Company, the sum of forty thousand dollars, upon the same terms, conditions and restrictions as provided in relation to the loans to the other railroad companies named in this act.

"SECTION 5. *Whereas* doubts have been suggested as to the true meaning and intent of the act referred to in the first section of this act, authorizing a loan to the Tennessee and Coosa Railroad Company, *be it, and it is hereby enacted*, That the true intent and meaning of said act shall be construed to be, that the said Tennessee and Coosa Railroad Company are bound and shall be bound by the terms of said act to pay the interest on said loan, and repay the principal in cash at the maturing of the loan authorized in and by said act; and the said railroad company shall not be entitled to receive any portion of the money set apart for said loan by the bill entitled 'An Act to loan and appropriate the three per cent. fund and its interest', (which has passed the house of representatives, and is now pending in the senate,) if the said bill should become an act, until said company shall deliver to the governor, to be filed in the office of the comptroller, a declaration and agreement, setting forth that the construction of said act as declared in and by this section is and shall be the true and rightful construction of the

same, and that the said company is and shall be bound thereby, and that no advantage shall be taken of any construction of which said act might be susceptible, contrary to the true intent and meaning thereof as declared in and by this section; and in taking the bond required of said company under the provisions of this act, for the security of the principal and interest of the amount to be loaned to said company, proper provisions and conditions shall be inserted in said bond for the payment of the interest and principal of the said loan in cash, in accordance with the construction of said act as defined and declared in and by this section; and the declaration and agreement hereinabove required by the said company shall be made in due form by the board of directors of said company, and shall be ratified by resolution of the stockholders of the company in convention, to be attested by the president and secretary of the company under the corporate seal of the company."—Session Acts 1859-60, pp. 110-11.

The act "to loan and appropriate the three per cent. fund and its interest," referred to in the 5th section of the act last above copied as then pending in the senate, by its 1st section, declared the amount of the three per cent. fund, principal and interest, to be \$858,498; "of which sum," it also declared, "\$195,363 is the balance due as a loan to the Tennessee and Coosa Railroad Company, under an act approved February 17, 1854, which said loan is ratified as prescribed in said act"; and, by its subsequent sections, loaned and appropriated the residue of said fund to other railroad companies therein specified. Session Acts 1859-60, p. 54. The act of 1854, above set out, was amended by a subsequent act, approved 19th December, 1855, by striking out the words "fully completed", where they occur in the 5th section, and inserting in their stead the words "completed as provided for in the first section of this act.—Sess. Acts 1855-6, p. 240.

The petition alleged, that the petitioner assented to the grant made by the said act of 1854 soon after its passage, and proceeded to grade its road as therein required, and

let out contracts for the completion of the entire road; that, in February, 1859, having completed one-fifth part of its road, and produced satisfactory evidence thereof to the governor, and tendered the prescribed bond, as required by the said acts of 1854 and 1855, it drew from the State treasury, on the warrant of the governor, the sum of \$50,000; that on the completion of another fifth part of its road, in October, 1859, and its full compliance with all the requisitions of said act of 1854, it received in like manner an additional \$50,000; that a few days after the passage of the act of February 18, 1860, above referred to, it received in like manner the residue of the sum thereby declared to be due to it; that on the 17th April, 1860, having completed another fifth of its road, it produced to the governor satisfactory evidence of that fact, and tendered to him another bond and mortgage, as required by said act of 1854; and that the governor refused to receive said bond and mortgage, and refused to draw his warrant in favor of the petitioner as required by said act of 1854. The acts of 1854 and 1855, and the act of February 18, 1860, were made parts of the petition; and the prayer was for a rule *nisi*, and for general relief.

The governor endorsed on the petition the following words: "I, Andrew B. Moore, governor of the State of Alabama, being willing and desirous that the legal question involved in the controversy between the Tennessee and Coosa Railroad Company and the State of Alabama, as shown by the within petition, should be decided without unnecessary delay, do hereby admit the facts stated in said petition, and agree, so far as I can legally do so, that the proceedings for a *mandamus* may be instituted in the circuit court of Dallas county, at the present term thereof; and I hereby waive the necessity of the ordinary rule to show cause, and agree that the cause may be proceeded with as though the rule had been duly issued and served on me."

On the hearing of the application, the petitioner read to the court the petition and acts therein referred to; and the respondent read the said act of February 24th, 1860, above copied, with the terms and conditions of

which, it was admitted, the petitioner had not complied. The circuit court thereupon overruled the application, and dismissed the petition; to which the petitioner excepted, and which is now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, and ALEX. & JNO. WHITE, for the appellant.—1. The act of 1854 grants a certain sum of money to the appellant, on the performance of certain conditions therein expressed, not as a gift, but by way of loan. It evidently contemplated the probability of future legislation as to the repayment of this money; authorizing such repayment to be made in the bonds of the company, or in some other mode than cash. But, in the event that no such legislation should be had, then the repayment was to be made in cash, within ten years; without interest for four years, and with interest at five per cent. after that time.

2. This act, and its acceptance by the railroad company, operated as a contract between the State and the company; and it was not in the power of the legislature, by subsequent legislation, without the consent of the company, to impair its force and obligation, by the imposition of additional limitations or restrictions on the loan. The charter of the company imposed no obligation on it to complete all or any part of its road within any specified time; but the act of 1854, after its acceptance by the company, bound it to grade one-fifth of its road within two years. On the faith of this act, the company has completed a portion of its road, and has let out contracts for the completion of the residue within the specified time. That the case presents all the elements of a contract, which, under the provisions of the constitution, cannot be impaired by subsequent legislation, see *Atwater v. Woodbridge*, 6 Conn. 223, 228; *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *Terrett v. Taylor*, 9 Cranch, 43; *Dartmouth College v. Woodward*, 4 Wheaton, 656; 15 B. Monroe, 642; 27 Miss. 517; *Green v. Biddle*, 8 Wheaton, 1-84; 10 Geo. 190; *Story on Constitution*, vol. 2, § 1385.

3. The act of 1860, under which the governor's refusal

to draw his warrant is justified, cannot operate simply as a revocation of the authority conferred on him by the act of 1854. That would be to allow the State to do indirectly what, under the authorities above cited, it could not do directly. The act of 1860 was evidently passed under the impression that the legislature had the authority to do what that act attempts to do—to impose additional limitations and restrictions on the loan authorized by the former act. An express repealing clause, in an unconstitutional statute, has no effect on existing laws; an implied repealing clause can certainly have no greater efficacy. The warrant to be drawn by the governor, under the act of 1854, must be either a right—an essential part of the contract—or a remedy. It could not have been intended as a remedy, for that only follows a breach. If it be a part of the contract, entering into the mode of payment, the legislature could not revoke the authority of the governor to issue it, without impairing the obligation of the contract. Moreover, the authority of the governor, since the acceptance of the act by the company, is in the nature of a power coupled with an interest, and is irrevocable.—*Hodgson v. Anderson*, 3 Barn. & Cr. 842; *Creager v. Link*, 7 Maryland, 267.

4. *Mandamus* lies whenever there is no other specific legal remedy for the enforcement of a specific legal right. It is evident that, in this case, an action at law, if it could be maintained, would not afford adequate redress for the injury suffered by the appellant in being deprived of the use of the funds to which it is entitled. The propriety of issuing a *mandamus* is to be determined, not by the office of the person to whom the writ is directed, but by the nature of the act to be done; and in the performance of duties purely ministerial, as in this case, the governor is amenable to that process equally with any other public functionary. In support of these propositions, see *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. United States*, 12 Peters, 614; *Etheridge v. Hall*, 7 Porter, 54; *Ex parte Pickett*, 24 Ala. 94; *Ex parte Jones*, 1 Ala. 15; *Riggs v. Pfister*, 21 Ala. 469; *Ex parte Cole*, 28 Ala. 50; 17 Ala. 527; *Baker v. Johnson*, 41 Maine, 15; *People v.*

Edmonds, 19 Barbour, 468; 2 Binney, 275; 15 East, 117; 14 East, 261; 1 Term, 396; 10 Wendell, 396; 5 Watts & S. 403-22; 19 Johns. 259; 9 Maryland, 83; 28 Miss. 38; 3 Burr. 1266; 23 Missouri, 353.

JOHN T. MORGAN, *contra*, argued the case orally at the bar, but submitted no brief or written argument.

R. W. WALKER, J.—In support of the action of the circuit court, three distinct propositions have been asserted and argued before us: 1st, that the court has not the power, in any case, to issue a *mandamus* to the governor of the State; 2d, that a *mandamus* does not lie in this case, even if the company is entitled to the money claimed, because the right to the issuance of a warrant is not a specific legal right, for which there is no adequate legal remedy; and, 3d, that the failure of the company to comply with the requisitions of the act of February 24th, 1860, (Acts '59-60, p. 110,) justified the governor in refusing to draw his warrant.

1. To the first proposition we cannot assent. Chief-Justice Marshall declared, and we concur in the remark, that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."—*Marbury v. Madison*, 1 Cranch, 170. By the constitution of this State, the powers of government are divided and distributed among three departments; the legislative, the executive, and the judicial. The governor, as the head of the second of these departments, is clothed with "the supreme executive power of the State;" and in the discharge of those political functions attached to his office, which depend on the exercise of his own judgment or discretion, his determinations are conclusive. Any attempt on the part of the judiciary to control or direct him in the performance of executive duties, about which he has a discretion, and may exercise his own judgment, would be a manifest usurpation of power. But there is nothing in the nature of his office, which can prevent the legislature from assigning to the

governor the performance of some mere *ministerial* acts, in regard to which he is not clothed with any *discretionary* power, his whole duty being that of simple obedience to the command of the legislature; and when this is done, the governor is to be viewed as merely the ministerial agent of the law; and if he fails or refuses to perform the act required of him, he is amenable to the law; and any person whose rights are dependent on the performance of such act, may have redress by resorting to the appropriate legal remedy.

In *Marbury v. Madison*, (1 Cranch, 137, 165,) Chief-Justice Marshall, after declaring that the acts of the head of one of the executive departments, in matters resting in executive discretion, can never be examinable by the courts, uses this language: "But, when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the law for his conduct, and cannot at his discretion sport away the vested rights of others."—See, also, pp. 170–1.

The doctrine that a *mandamus* will lie against one of the executive officers of the government, to enforce the performance of a mere ministerial act, was distinctly affirmed in *Kendall v. The United States*, 12 Peters, 524, 595, 610, 626, 641. In that case, Mr. Butler, the attorney-general, admitted in his argument, that, "as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, if an executive officer, the head of a department, even the president himself, were required by law to perform an act merely ministerial, and necessary to the completion or enjoyment of the rights of individuals, he should be regarded, *quoad hoc*, not as an executive, but as a merely ministerial officer; and therefore liable to be directed and compelled to the performance of the act by *mandamus*, if congress saw fit to confer the jurisdiction."—12 Peters, 595.

The same principle applies to judicial officers, who,

though not answerable for errors of judgment, however plain the mistake, are responsible for any injury which results from their failure to perform a ministerial duty cast upon them by law. In *Ferguson v. Earl of Kinnard*, (9 Clark & Finn. 279, 290,) Lord Brougham, after stating the first branch of this proposition, added: "But, where the law neither confers judicial power, nor any *discretion* at all, but requires certain things to be done, everybody, whatever be its name, and whatever other functions of a judicial or discretionary nature it may have, is bound to obey; and, with the exception of the legislature and its branches, everybody is liable for the consequences of disobedience." Lord Campbell said in the same case (p. 312): "Where there is a *ministerial* act to be done by persons who, on other occasions, act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were, on any occasion, entrusted to them. There seems no reason why the refusal to do a *ministerial* act, by a person who has certain *judicial* functions, should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction."—See, also, opinions of Lord Lyndhurst and Lord Cottenham, pp. 280, 306.

All this is but the result of the just and wholesome principle, that no public functionary, whatever his official rank, is above the law, or will be permitted to violate its express command with impunity. While, therefore, it is true that, in regard to many of the duties which belong to his office, the governor has, from the very nature of the authority, a discretion which the courts cannot control; yet, in reference to mere *ministerial* duties imposed upon him by statute, which might have been devolved on another officer if the legislature had seen fit, and on the performance of which some specific private right depends, he may be made amenable to the compulsory process of the proper court by *mandamus*.—Authorities *supra*; *State of Ohio v. Chase*, 5 Ohio St. R. 528; *Citizens v. Wright*, 6 Ohio St. R. 318; *Pacific R. R. Co. v. Governor*, 23 Missouri, 353.

As the case stands upon the petition, and the admission

by the governor of the facts stated in it, everything has been done by the company which is required by the act "to aid the Tennessee and Coosa Railroad," approved February 17, '54, (Acts '53-4, p. 280;) and if we look to that act alone, nothing remains to be done, so far as the governor is concerned, but what is purely *ministerial*—namely, the reception of the bond and mortgage, and the issuance of a warrant. In performing these ministerial duties, the governor does not proceed according to his own judgment or discretion, but in obedience to the peremptory command of the legislature, and as a mere agent of the State, appointed and required by statute to do a particular thing. As the *mandamus* is moved for to enforce the performance of a ministerial act expressly enjoined by statute, the fact that the officer against whom it is sought is governor of the State, is not, of itself, an answer to the application.

2. But the petitioner is not entitled to the writ, unless it appears that there is no other adequate legal remedy for the wrong complained of. And this brings us to the second proposition insisted on, in support of the ruling of the circuit court—namely, that, looking alone to the act of 1854, and conceding that the petitioner has complied with all of its provisions, and is entitled to the money claimed, the right to have a warrant issued by the governor is not a specific legal right, for which the writ of *mandamus* affords the only adequate legal remedy.

The right which the petitioner asserts is, in two aspects, a specific legal right. The act of February 17th, 1854, above referred to, gives to the petitioner, on its performance of the prescribed conditions, the right to the use of a sum of money, on certain terms set forth in the act. This is as much a legal right, as the right to the use of any other property. Again, the act of 1854 imposes as a duty on the governor the issuance of his warrant on the custodian of a specified fund, for the payment of a certain sum of money to the petitioner, on its complying with the requisitions of the statute. The governor being bound by law to perform a duty for the benefit of the company, the latter has a clear legal right to have it performed.

To deprive a party of his remedy by *mandamus*, on the ground that he has a remedy by action, the remedy by action must be adequate to the specific object in view—"framed to effect directly the desired end." It must afford complete satisfaction, "equivalent to specific relief." In matter of Trustees of Williamsburg, 1 Barb. Sup. Ct. R. 34-5; Harwood v. Marshall, 9 Maryland, 83, 98; Kendall v. United States, 12 Peters, 614; Etheridge v. Hall, 7 Porter, 54; *Ex parte* Pickett, 24 Ala. 94; 3 Halst. 206; 2 Dougl. 525; Carroll v. Board of Police, 28 Missouri R. 38, 52.

Without stopping to inquire whether the company could maintain an action for damages against the officer or the State, we find no difficulty in deciding, that any such action would be inadequate to the object in view, and fall far short of affording a complete satisfaction to the petitioner. The great end to be attained by the railroad company is the building of the road; and this was the object which the State had in view in making the loan or advance provided for by the act of 1854. The purpose of the legislature was, to enable the company, by the aid afforded by the act, to complete the work at an earlier period than was required by the charter. One of the conditions of the act of 1854 is, that before any warrant can be issued in favor of the company, it shall give bond, with security satisfactory to the governor, for the completion of the road within ten years from the passage of the act. The petition shows that, before receiving the first payment, the company did give this bond; and that upon the faith of the act of 1854 it has let the entire road to contract. In order to carry on the work, it relies upon obtaining, promptly, as it becomes entitled to them, the sums of money secured to it by that act. The failure to receive the sums loaned or advanced by that act, at the times and in the manner provided, will leave the company without means to meet the obligations which it has incurred to contractors, and will put it out of its power to comply with its undertaking to complete the road within ten years from the passage of the act. It is obvious, therefore, from the very nature of the case, that an

action for damages would be a remedy wholly inadequate to the object in view. Under the rules of law controlling the measure of damages, such an action would not afford complete redress for the injury which the company would sustain, if it should fail to receive promptly, as they fall due, the sums necessary to enable it to proceed without interruption with the construction of the road.—See *Kendall v. United States*, 12 Peters, 614–15; *Carroll v. Board of Police*, 28 Missouri R. 38, 52.

It is, perhaps, proper to add, that we do not intend by anything we have said to intimate that the company would have the right to appropriate any part of the money received from the State in a manner inconsistent with the second section of the act of February 17, 1854.

3. We now come to consider the third proposition urged in opposition to the motion for a *mandamus*—that is, that although the company has done everything which it was required to do by the act of 1854, in order to entitle it to the warrant; yet that the governor properly refused to issue it, because the company has not complied with the requisitions of the act of February 24th, 1860, (Acts '59–60, p. 110.)

The question, whether the failure of the company to comply with the requisitions of the last named act justified the governor in his refusal to draw his warrant in its favor, depends upon the character and legal effect of the act of February 17th, 1854, when considered in connection with the facts stated in the petition, and admitted by the governor. If that act, after its provisions had been accepted and acted on by the company, constituted a contract between the State and the company, the legislature had no right by any subsequent act, without the consent of the company, to change its terms, or impair its obligations.

Although not delegated in express terms by the constitution, the power of the legislature to bind the State by contract is not open to question. It is one of the incidental powers necessary to the proper discharge of the functions of government, and is included in the general grant of “the legislative power of the State,” which the

constitution makes to the general assembly. Nor is the legislature limited as to the manner in which it may contract, whether directly by statute, or through agents appointed for the purpose, in the ordinary form of contracts between individuals. Whatever its form, the contract of a State is, like any other contract, binding upon the parties; nor can the people, or their representatives, by any subsequent act of theirs, alter or annul it. When the contract is made, the constitution of the United States acts upon it, and puts it beyond the power of any succeeding legislature to impair its obligation.—2 Story on Const. § 1391; 16 Howard, 369, 416; 11 Peters, 549.

That the act of 1854 is, in the strictest sense of the term, a contract between the State and the railroad company, seems too clear to be disputed. The charter of the company (Acts 1843-4, p. 170) imposed no obligation on it to complete all or any part of the road within any given time. But, by the act of 1854, the legislature proposed to the company, that if it would grade one-fifth of the road within two years from the date of that act, and give bond to complete the entire road in ten years, it should receive on certain specified terms \$50,000 of the three per cent. fund, and that on the completion of each succeeding fifth part of the road, and the giving of a like bond, it should receive the same amount. The company accepted this proposition of the legislature, and, in pursuance of it, graded the first fifth part of the road within the time stipulated; has since then graded other portions of the road, and, having given bond and security as required for the completion of the entire road in ten years, has received from the State two payments, of \$50,000 each, out of the fund designated by the act. Here are all the elements of a valid and binding contract—the concurrence of intention between two parties competent to contract, one of whom promises something to the other, in consideration of something agreed to be done by the latter. On the part of the State, the obligation is, "*do ut facias*;" on the part of the company, it is "*facio, ut des*."

Undoubtedly, the legislature considered that the com-

pletion of this road within the time specified in the act of 1854 would greatly advance the interests of the State, and that the public benefit thus conferred would be a full equivalent for the use of the money by the company. But it is not necessary to the validity of the contract that the consideration for the promise of the legislature should be one of benefit to the State. It is sufficient if it import damage, or loss, or forbearance of benefit, or any act done or to be done on the part of the company.

The company, then, by accepting the proposition of the legislature, and complying with its terms in the manner shown in the petition, acquired a vested right to the fulfilment of the contract by the State, of which no subsequent legislation could deprive it.

It cannot be seriously contended, that the act of February 24, 1860, does not "impair the obligations" of the prior contract between the State and the company. "It is perfectly clear, that any law which enlarges, abridges, or in any manner changes the intention of the parties resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected, can in no respect influence the conclusion; for, whether the law affect the validity, the construction, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all supposed cases. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, *imposing conditions not expressed in the contract*, or dispensing with the performance of those which are a part of the contract, *however minute or apparently immaterial in their effect* upon it, impairs its obligation."—Story on Const. § 1385, and cases cited.

The 5th section of the act of February 24, 1860, declares the construction which shall be put upon the act of 1854, and provides, that the company shall not be entitled to receive any part of the money previously promised, until it shall file in the office of the comptroller a declaration or agreement, made by the directors, and ratified by the stockholders in convention, that the construction thus placed upon the act of 1854 is the proper

construction, and that no advantage shall be taken of any different construction of which it may be susceptible. The same section also provides, that in taking the bond required of the company, proper provisions and conditions shall be inserted for the payment of the principal and interest of the loan in cash, in accordance with the construction placed by that section on the act of 1854. The requirement of "the declaration or agreement" of the company, is the imposition of an entirely new condition; and the provision in reference to the bond contemplates a change in its form at least, if not in its legal effect. This 5th section of the act of February 24, 1860, is, therefore, unconstitutional and void, because it impairs the obligation of a valid contract between the State and the company, by imposing new conditions, and declaring that unless they are complied with the contract shall be abrogated.

It is said, however, that although this act is unconstitutional and void, so far as it seeks to change the terms of the original contract evidenced by the act of 1854, still it is effectual as a revocation of the authority conferred upon the governor by the last named act. The proposition is, that under the act of 1854, the governor is simply the agent of the State to issue a warrant in favor of the company; that the State had the right to revoke his agency, and that it has done so by the act of 1860. If the State can avoid the effect of a contract by withdrawing the authority of its agent to execute it, it is not easy to escape the conclusion, that the State would not be bound by any contract; for it rarely (if ever) executes a contract except through an agent, and if inclined to repudiate its obligations, it could do so, not directly, by changing or annulling the contract, but indirectly, by revoking the authority of its agent to execute it.

But the act of 1860 does not expressly revoke the authority conferred upon the governor by the act of 1854. It simply provides, that the company shall not be entitled to receive the money until certain conditions are complied with. These conditions, we have already seen, the legislature had not the constitutional power to impose; and it

is difficult to perceive upon what principle an implied revocation of a valid agency can result from an unauthorized attempt on the part of the principal to require of the other party to the contract the performance of new conditions. No doubt the legislature supposed that it had authority to make these requisitions of the corporation, and intended to revoke the agency of the governor, only in the event that the requisitions were valid. And it would be unjust to the legislature to infer that, by requiring of the company the performance of new conditions which it had not the right to impose, it intended to revoke the authority of its agent, and thus to destroy the means of executing the contract. It is upon a principle analogous to this, that an unconstitutional statute is not allowed to operate a repeal by implication of a prior statute with which it is in conflict; and even a repealing clause in an unconstitutional statute, declaring that "all laws contravening the provisions of this act be, and the same are hereby repealed," does not affect the previous laws.—*Tims v. State*, 26 Ala. 165. The act of 1854 created the agency; and certainly the revocation of that agency, which is, *pro tanto*, a repeal of the statute, cannot result by *implication* from a subsequent unconstitutional act. Having thus ascertained that the legislature has not revoked the authority conferred upon the governor by the act of 1854, it is not necessary for us to consider whether his agency is not in fact so far a part of the contract that the legislature would have no power to revoke it, even by a statute framed expressly for that purpose.

[4.] It has been suggested, that the act of 1854 is void for uncertainty; and that for that reason, if no other, this application should be refused. It is not to be denied that, in some of its parts, the statute is singularly obscure and difficult of construction. It clearly provides, however, that on the performance by the company of certain conditions precedent, it shall be entitled to receive at different times specific sums of money out of the three per cent. fund. Thus far all is clear; and the only doubts which can arise, as to the meaning of the statute, are as

to the obligations which the reception of the money and the execution of the required bond impose upon the company. This part of the act is separable from those to which we have referred as free from obscurity; and hence, it does not follow, that these last would fail, even if it were impossible to assign a meaning to the former. This, however, is not the case. The statute first provides, that \$250,000 of the three per cent. fund "be loaned or advanced" to the company, which is required to give bond for the payment, in the manner provided by the act, of the sums it may receive. This language very clearly indicates, that the grant is by way of loan—not gift—and that the company is to be bound for its payment. What follows shows that the legislature contemplated the probability of future legislation as to the mode of payment, so as to authorize the payment in some other mode than cash; and the intention was, that if there should be no such legislation, and the repayment should be made in cash, then it should be made within ten years, with interest at five per cent. per annum after four years. In other words, the intention was, that in the absence of future legislation as to the mode of payment, the company was to be bound to repay the sums received within ten years from the receipt of the same, without interest for four years, and with interest at five cent. per annum after four years. And this, we think, is the legal effect of the bond which the company is required to execute.

We have not adverted to the act "to loan and appropriate the three per cent. fund and its interest," approved February 18th, 1860, (Acts '59-60, p. 54,) for the reason that it was, so far as the petitioner is concerned, a mere reaffirmance of the act of 1854, and can, therefore, exert no influence on the decision of the question now before us.

It is proper to remark, that the governor has shown no disposition to deny the jurisdiction of the courts over the question as to what is his legal duty in reference to the warrant claimed by the company. On the contrary, he expressly concedes it to be a legal question, determinable by the courts, and has done all that he could do, to facili-

tate the proceedings with a view to its early decision. The legislature having declared by the act of February 24, 1860, that the company should not receive any further payments out of the three per cent. fund, until it had complied with certain requisitions set forth in the act, the governor very properly felt it to be his duty to conform his action to this declaration of the legislative will, until it should be judicially determined that the legislature had not the power to impose such conditions on the company.

[5.] The judgment of the circuit court must be reversed, and, under the rule established in *Edmonds v. Edmonds*, (1 Ala. 401,) *Townsend v. Harwell*, (18 Ala. 301,) and *Rawls v. Doe, d. Kennedy*, (23 Ala. 240, 255,) the cause must be remanded.

JETER vs. JETER.

[BILL IN EQUITY FOR DIVORCE ON GROUND OF ADULTERY.]

1. *Proof of adultery.*—To establish the charge of adultery by circumstantial evidence, the circumstances proved must be such as would lead the guarded discretion of a reasonable and just man to the conclusion that the crime had been committed; but the fact that the husband, without justifiable cause, voluntarily abandons his wife's bed within a year after their marriage, lends additional weight to suspicious circumstances against him, and tends to give them an unfavorable construction. Tested by these rules, the evidence in this case is sufficient to prove adultery on the part of the husband.
2. *Alimony: how decreed.*—When a decree of divorce *a vinculo matrimonii* is rendered in favor of the wife, the statute (Code, § 1971) authorizes the chancellor to allow her a sum of money in gross by way of permanent alimony.
3. *Amount of alimony.*—In determining the amount of permanent alimony to be allowed to the wife, when a divorce is granted to her on account of the husband's adultery, her own conduct is a proper matter for consideration, (Code, § 1972;) but the mere fact

that, after her abandonment by her husband, she spoke of him and of her former engagement to be married to another man in an indiscreet and improper manner, does not justify the denial of a liberal allowance to her.

4. *Same*.—An allowance of \$20,000 to the wife, as permanent alimony, where the value of the husband's estate is between \$40,000 and \$50,000, would, ordinarily, be excessive; but, under the special circumstances of this case—it appearing that the husband had only two children, the elder of whom was a man thirty years old, for whom he had already made liberal provision, while he disowned the younger, who was the only child of the complainant—is not unreasonable.
5. *What is revisable*.—On appeal from a final decree in chancery, granting to the wife a divorce *a vinculo matrimonii*, and ordering the husband to pay her a specified sum as temporary alimony, and an additional sum to her solicitors as compensation for their services, the order for the payment of the solicitors' fees is revisable: but, on the question whether the order for the payment of temporary alimony is revisable, the majority of the court express no opinion. (A. J. WALKER, C. J., *dissenting*, held that neither portion of the order for the payment of money was revisable.)
6. *Alimony pendente lite*.—An order for the allowance of temporary alimony, though usually made at an early stage of the cause, and on a reference to the master, may be made on the final hearing, and without an order of reference; the allowance is not restricted to a sum sufficient to provide for the wife the mere necessities of life, but depends on the circumstances and social position of the parties; and the decision of the chancellor will not be reversed by the appellate court, unless the record presents a strong and plain case of error.
7. *Allowance of solicitors' fees*.—An allowance for the fees of the wife's solicitors must be restricted to the actual reasonable value of their services, and should not be made without a reference to the master, or proof as to the proper amount.
8. *Decree affirmed in part, and reversed and remanded in part*.—The decree of the chancellor in this case, granting a divorce to the wife, was reversed, and the cause remanded, as to the order making an allowance to the wife for her solicitors' fees, but was affirmed in every other respect; and the costs of the appeal were imposed on the appellant.
9. *Estimate of wife's statutory separate estate in determining amount of permanent alimony*.—After the delivery of the opinion in this case, affirming the chancellor's decree on the merits, but remanding the cause, in order that a reference to the master might be made to ascertain the amount of compensation to be allowed to the complainant's solicitors, the parties compromised the matters in controversy between them; and after the full execution of the agreement, by which the appellant obtained some advantages to which

he was not entitled under the decree, his counsel having called the attention of the court to the fact, not before noticed, that the wife was shown by the record to possess a statutory separate estate, the value of which did not appear to have been shown in any manner to the chancellor, or to have been estimated by him in determining the amount of her permanent alimony,—*held*, that the decision in the cause, under these circumstances, should not be considered as settling the rule, that an allowance out of the husband's estate, as permanent alimony to the wife, can be sustained on appeal, where the wife has a statutory separate estate, unless it appears that the value of that estate was shown to the chancellor, either by the evidence in the cause, or by the report of the master under a reference. (A. J. WALKER, C. J., *dissenting*, held that in view of the great disparity between the estates of the parties as disclosed by the record, the appellate court should take judicial notice of the fact that the wife's separate estate was not sufficient for her maintenance.)

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 26th November, 1858, by Mrs. Sarah Jeter, suing by her next friend, against her husband, Samuel Jeter; and sought a divorce *a vinculo matrimonii*, on the grounds of cruelty and adultery. The defendant filed an answer, denying the charges of cruelty and adultery, and demurring to the bill for want of equity. It appears that the parties were married on the 6th March, 1853; that on the 25th April, 1854, Mrs. Jeter gave birth to a son, the only child of the marriage; that the defendant disowned the paternity of this child, and refused to have any further intercourse with the complainant as his wife; that they continued to live together in the same house, occupying separate chambers, until about the 1st November, 1858, when an altercation occurred between them, growing out of the complainant's refusal to sign a deed, which resulted in her leaving her husband's house, and returning to her father's.

The testimony taken in the cause is very voluminous, but a full statement of it is not material to an understanding of the legal questions here presented. The depositions of Eleazar Taylor and James Singley were

taken by the complainant to substantiate the charge of adultery. Taylor, who was a brother of the complainant, testified as follows: "In the summer of the year 1857, I was at the defendant's house, and stayed all night. About an hour after I had lain down, I had occasion to get up and go out; and when I got down to the foot of the steps, I saw the defendant (it being a moonlight night) out at the edge of the yard, near the carriage-house, and also a negro girl, who, I think, was Emeline. I saw her lie down, and saw the defendant get down over her on his knees; and I then turned, and went out at another door, in a different direction." The material portion of the testimony of Singley, who was the defendant's overseer during the years 1856 and 1857, is in these words: "On one occasion, in the night, I saw a negro girl at his [defendant's] window. She disappeared through the window. I think it was Emeline. On another night, at a late hour, I saw him coming from towards his negro-cabins. Whether he had been in there or not, I wont say. He went towards his room, and soon afterwards I saw a negro girl going after him."

The bill alleged, that the complainant carried to her husband's house, on her marriage, a negro woman and a piano; and that the defendant's property, real and personal, was worth about \$80,000. The defendant admitted the allegation of the bill as to the negro woman and the piano, and appended to his answer a list of his own property, estimating its value at \$45,900.

At the May term, 1859, before the cause was submitted for final hearing, the complainant applied to the court for an allowance of alimony *pendente lite*, and money to defray the necessary expenses of the suit; and it was agreed that the questions arising on this application should "be considered and decided by the chancellor with the main questions." On final hearing, on pleadings and proof, at the same term, the chancellor held the evidence sufficient to establish the charge of adultery, and granted a divorce on that ground. He also declared that the complainant was entitled to the negro woman and piano claimed by her, and ordered the defendant to deliver them up to her;

granted five hundred dollars to the complainant as alimony *pendente lite*, one thousand dollars to her solicitors as compensation for their services in the suit, and twenty thousand dollars to the complainant as permanent alimony; ordered execution to be issued against the defendant for the payment of these several sums, and declared a lien on his property for the payment of the twenty thousand dollars. The rendition of this entire decree, and of each separate portion of it, is assigned as error in this court.

GOLDTHWAITE, RICE & SEMPLE, with BROOK & BARNES, for the appellant.—1. The testimony in the cause is insufficient to sustain the charge of adultery. The principal witness is the complainant's own brother, whose testimony is unnatural and improbable, and who was not examined until all the other witnesses had failed to sustain the charge. It is shown, too, that the girl with whom, according to the testimony of this witness, the crime was committed, was not at that time fourteen years of age. The evidence is much weaker and more inconclusive than in the case of *Mosser v. Mosser*, (29 Ala. 313,) which was held insufficient. See, also, *Bishop on Marriage and Divorce*, §§ 423, 424, 428, 439, 330; *Hamerton v. Hamerton*, 4 Eng. Ec. R. 13; *Bray v. Bray*, 2 Halsted's Ch. 506, 628; *Ferguson v. Ferguson*, 3 Sandford's (N. Y.) 307; *Wood v. Wood*, 2 Paige, 108; *Hart v. Hart*, 2 Edw. Ch. 207.

2. The chancellor erred, also, in decreeing to the complainant a sum of money in gross, as permanent alimony. According to the practice of the ecclesiastical courts in England, upon a divorce *a mensa et thoro* in favor of the wife, a gross sum is never given to her as permanent alimony, but allowances are made for her support and maintenance from year to year, payable at stated periods. *Bishop on Marriage and Divorce*, § 591, and cases cited. But for statutory provisions, neither alimony nor any other allowance could be decreed to the wife, on a divorce *a vinculo*; such a divorce, with its incidents, being unknown to the common law. The statute (Code, § 1971) w s

simply intended to secure to the wife, when a divorce is rendered in her favor, a liberal allowance for her support and maintenance, if her separate estate is not sufficient for that purpose. A provision for maintenance should be co-extensive with the life of the party to be supported, for it would be absurd to speak of maintenance as continuing after the death of the party to be maintained. To give the wife a sum absolutely, which she might squander or lose within a year, would be unjust to each of the parties, and would defeat the manifest object of the statute. The decision in the case of *King v. King*, (28 Ala. 315,) on this point, is erroneous, and ought to be overruled.

3. All the assignments of error are insisted on.

WM. P. & THOS. G. CHILTON, with whom was J. FALKNER, *contra*.—1. The direct evidence in the cause, viewed in connection with the defendant's conduct towards his wife, and the state of feeling shown to have existed between them, is amply sufficient to establish the charge of adultery.—*Chambers v. Chambers*, 1 Hag. Con. 439, (4 Eng. Ec. 445-48;) 7 Eng. Ec. 377; 17 Ala. 250; *Bishop on Marriage and Divorce*, §§ 423, 330.

2. The allowance of a sum of money in gross, as permanent alimony, was justified by the statute, as has been expressly decided in the case of *King v. King*, 28 Ala. 315. That the payment of the money may be secured by a lien on the defendant's property, see an analogous case in *Foster v. Gressett's Heirs*, 29 Ala. 393. The sum allowed, though it might ordinarily be too large, cannot be considered excessive under the peculiar circumstances of this case. It is shown that the defendant, now an old man, has but two children; that he has already made a liberal provision for the elder, while he disowns the younger, the only child of the complainant; and that the sum allowed to the complainant, for herself and child, is about equal to her distributive share of the defendant's estate.

3. The allowance of temporary alimony and solicitors' fees was proper.—Code, §§ 1970-72. The chancellor

was authorized to fix the compensation of the complainant's solicitors, without a reference to the master, and without the formal introduction of any more proof than was already before him.—Adams' Equity, 379, note; Lever v. Redwood, 9 Porter, 79; 3 Dan. Ch. Pr. 2130; 5 Ves. 706; 11 *ib.* 328; 6 *ib.* 428; 3 Brown's Ch. (m. p.) 234. Moreover, the allowance of these items, if not within the sole discretion of the chancellor, cannot be reviewed on appeal from the final decree.—*Ex parte* King, 27 Ala. 387.

A. J. WALKER, C. J.—The defendant in this case, after the lapse of a little more than one year from his intermarriage with a young lady in the freshness of early womanhood, utterly abandoned the nuptial bed, and subjected his wife to an almost total exclusion from social intercourse with him. This singular state of self-imposed conjugal estrangement, for which we can deduce from the testimony no justification, commenced at the very time when the birth of a child should have drawn him into a closer and more endearing union, and continued during a period of more than four years, and until a final separation occurred. It is a teaching alike of human experience and of the law-books, that in the marriage state contented affection is one of the surest safeguards, and most satisfactory evidences of fidelity; while causeless alienation, and unaccountable and unreasonable aversion, are temptations to infidelity, and often the accompaniments and results of it.—Bishop on Mar. and D. § 420; Richardson v. Richardson, 4 Porter, 674. St. Paul, in the 7th chapter of his first epistle to the Corinthians, has set forth the regular enjoyment of wedded love as a shield of virtue; and Milton says, that by it

"Adulterous lust was driven from men,
Among the bestial herds to range."

Then, whether we look to the legal authorities above cited, or to the teachings of nature and holy writ, we are authorized, in a case of conjugal conduct like that of the defendant, to yield a more easy credence to circumstances which impugn the chastity, and may more properly give suspicious facts an unfavorable construction.

"Adultery is peculiarly a crime of darkness and secrecy; parties are rarely surprised in the act; and so it not only may, but ordinarily must, be established by circumstantial evidence."—Bishop on Mar. and D. § 422; Lawson v. State, 20 Ala. 65, 79. In reference to the character of circumstances requisite to establish the charge, Lord Stowell says: "In every case almost, the fact is inferred from circumstances that lead to it by fair inference, as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. What are the circumstances which lead to such a conclusion, can not be laid down universally, though many of them, of a more obvious nature, and of more frequent occurrence, are to be found in the ancient books. At the same time, it is impossible to indicate them universally; because they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings in decisions upon the particular case. The only general rule that can be laid down upon the subject is, *that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion*; for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man."—Loveden v. Loveden, 2 Hag. 1, 4 Eng. Ec. 461. Lord Stowell's rule is, perhaps, as definite as any that could be prescribed, and is not variant from the one recognized in this court, that the fact may be inferred "from circumstances leading to it as a necessary conclusion."—Richardson v. Richardson, 4 Porter, 475; State v. Crowley, 13 Ala. 172; Mosser v. Mosser, 29 Ala. 313. Under the rule above set forth, the inference of adultery could not be drawn from circumstances reasonably reconcilable with the assumption of innocence.—Bishop on Mar. and D. 428.

The testimony in reference to the commission of adultery by the defendant, is found in the depositions of the witnesses Taylor and Singley. The circumstances proved by Taylor are, when judged as they "would strike the careful and cautious consideration of a discreet man", certainly sufficient "to lead the guarded discretion of a reasonable and just man to the conclusion" of the defendant's guilt. There is no other reasonable supposition which will account for the attitude described of persons of different sexes, occupying the relation which existed between the participants in the transaction at the time and place stated. The charge of adultery has been sustained upon circumstances less conclusive.—Harris v. Harris, 2 Hag. 376. The testimony of this witness is corroborated by that of Singley, which tends to show the perpetration of similar conduct, with the same person, on another occasion. And the relation in which the defendant lived with his wife, and his conduct towards her, the proper influence of which upon the issue was shown at the outset of this opinion, afford to the testimony of Taylor a strong corroboration, by giving to it a complexion of probability and reasonableness. We find nothing in the course pursued by the witness, after he had observed the facts proved, to justify the dispute of his credibility. Corroborated and supported as is the evidence of this witness, we feel bound to give it our fullest faith, notwithstanding he is the brother of the complainant. While his relationship subjects him to the suspicion of bias and prejudice, in such a case as this, it is no ground for the rejection of the evidence; and the corroboration of the testimony takes from the objection the slightest claim to consideration here.—Lockwood v. Lockwood, 2 Curt. 114. The defendant's commission of adultery being established, the complainant was entitled to a divorce *a vinculo matrimonii*, under section 1961 of the Code.

The argument, that the girl with whom the adultery is alleged to have been committed, had not attained the age of puberty, is not supported by the testimony.

[2.] Our law, as it existed before the adoption of the Code, required that the allowance, upon a decree of di-

vorce *a vinculo matrimonii*, should be made by a division of estate.—Clay's Digest, 170, § 8; Lovett v. Lovett, 11 Ala. 763; Quarles v. Quarles, 19 Ala. 363. The language of the present is materially different from that of our old law, and is as follows: "If the wife has no separate estate, or if it be insufficient for her maintenance, the chancellor, upon granting a divorce, must decree the wife an allowance out of the estate of the husband; taking into consideration the value thereof, and the condition of the family."—Code, § 1972. In the case of King v. King, (28 Ala. 315,) upon the authority of this section of the Code, a pecuniary allowance by way of permanent alimony was made by the chancellor, and the decree was affirmed by this court. We have, therefore, the sanction of a judicial precedent for so construing the above copied section of the Code as to permit an allowance to be made by a decree for money, instead of by a division of the estate. This construction of our statute meets the exigency of that class of cases, in which a division of the estate in specie would be impracticable, or inconvenient; is consistent with the decisions in other States in reference to similar statutes; does no violence to the language of the law, and ought to be maintained as correct.—Samford v. Samford, 5 Day, 553; Fischli v. Fischli, 1 Blackf. 360; Richmond v. Wilson, 8 Yerg. 67. It is, therefore, no fatal objection to the chancellor's decree in this case, that it is for alimony to be paid in money.

[3.] The amount of the decree in the complainant's favor is \$20,000; and this, it is contended, is excessive. Section 1972 of the Code provides, that "if the divorce is in favor of the wife, for the misconduct of the husband, the allowance must be as liberal as the estate of the husband will permit; regard being had to the condition of his family, and to all the circumstances of the case." The ascertainment of the proper allowance to a woman, obtaining a divorce, can not be subjected to any fixed standard, and it must necessarily be left, in a great degree, to the control of judicial discretion. We have, however, in the section last above quoted, supplied to us

by the legislative hand, the principles which are to influence that discretion. The court must consider the circumstances of the case, the condition of the family, and the estate of the husband, and then make (the husband's misconduct being the ground of divorce) an allowance to the wife, which, viewed in the light of all these considerations, is liberal.

The conduct of the complaining wife, as developed in the circumstances of this case, is certainly a proper matter of consideration. The manner in which the complainant spoke of her husband, in a letter addressed to an unmarried gentleman, who was her relative, and spoke of him and of her marriage to a gentleman with whom she had once had a matrimonial engagement, was extremely indiscreet and reprehensible, but involved no moral turpitude. While these acts can not be passed by without condemnation and censure, as inconsistent with the conduct of a prudent spouse; yet we have no evidence of the occurrence of such conduct on other occasions, and those acts seem to stand as blots upon a history otherwise blameless. Besides, it is some palliation of her improper conduct in those particulars, that it did not occur until her husband had withdrawn every manifestation of affection, and deprived her of his counsel. For such misconduct, perpetrated under such circumstances, justice does not demand the denial of a liberal allowance to her. The defendant imputes a criminality to his wife, which would justify his deportment to her, and deprive her of all claim to his liberality, or to the liberality of the court; but, if such criminality existed, it is his misfortune that he has not been able to prove it, and the court must act upon the case as made by the testimony.

[4.] A rule for the ascertainment of the alimony of a wife obtaining a divorce has been frequently adopted, by which she obtains the same allowance that she would have received had she been widowed by the death of her husband. That rule was adopted in the case of *King v. King*, (28 Ala. 315,) and has been sometimes adopted in other States.—*Thornberry v. Thornberry*, 4 Litt. 251; *Jeanes v. Jeanes*, 2 Har. 142. Bishop, in his able work

on Marriage and Divorce, (§§ 623-625,) commends this rule as a standard, beneath which the court should not fall, except in special cases. It can probably be adopted, with justice and propriety, in a larger number of cases than any other; but the very nature of the subject, the diversity of the considerations to be regarded, and the difference between the parties and families to be affected, all forbid that that, or any other, should be adopted as a universal rule. Cases may be conceived, in which the allowance, according to that rule, would be too little; and others in which it would be too much. It must always be held subject to variation by the circumstances of the particular case.

According to the statement of the defendant's answer, his wealth now amounts to about \$46,000. He has two children; both sons; one the child of a former marriage, the other the fruit of his marriage with the complainant. The amount allowed by the chancellor no doubt exceeds the value of the dower and distributive share which the complainant would have received had she survived her husband; and it would be excessive, in the absence of special circumstances justifying a departure from the rule above indicated. Such special circumstances are found in this case. The defendant, with a generosity which we commend, has provided liberally for his oldest son, who is now over thirty years old; and that provision probably exceeds the amount of the allowance to the complainant. The defendant, without any cause which we can gather from the evidence, disclaims the paternity of the child of his present marriage, and exhibits a sentiment towards it which precludes all probability of his voluntarily contributing to its support and education, or permitting it to share in his estate. The wife's expenses and responsibility will on that account be increased, and the duty must devolve upon her alone of bringing the child forward when he attains his majority; and the child can never receive any of his father's estate, save through its mother. By virtue of the chancellor's decree, the mother, with her son, will get a sum less, perhaps, than that which the defendant's older son has already received, and

much less than will be left in the father's hands, to remain an expectancy for the older son. This view of the condition of the family, and of the operation of the decree upon the members, shows that no injustice has been done by the chancellor in fixing the amount of the complainant's alimony, and it ought not to be disturbed.

We entertain no doubt of the authority of the chancellor to secure the payment of his decree, by declaring a lien upon the defendant's property.

[5-7.] So much of the chancellor's decree as pertains to the wife's support pending the litigation, and her expenses of suit, is not, in my opinion, before us for revision. The order of the chancellor upon these subjects is clearly not a final decree, (*Ex parte King*, 27 Ala. 387,) but, on the contrary, is subject to alteration during the pendency of the suit, when there has been a change in the husband's circumstances.—*De Blaquiere v. De Blaquiere*, 3 Hagg. 322, (5 E. Ec. R. 126;) *Rogers' Ecclesiastical Law*, 39; *Shelford on Mar. and D.* 596. As the order for temporary alimony and the wife's expenses of suit was not a final decree, it is not, of itself, the subject of an appeal; for an appeal, under our system, lies only from a final decree.—Code, § 3016. If, then, it is before this court at all, it is by virtue of the appeal from the final decree. An appeal from a final decree, in my opinion, brings before the revising tribunal only those orders which, either directly or indirectly, affect the final decree; but does not bring up any antecedent or contemporaneous order, which does not in the slightest degree affect the final decree. I think the authorities fully sustain this position. *Jacques v. Methodist Church*, 17 Johns. 559; *Wilson v. Troup*, 2 Cow. 208; *Reid v. Vanderheyden*, 5 *ib.* 735-737; *Atkynson v. Munks*, 1 *ib.* 702; *Johnson v. Britton*, *Dudley's Law and Eq.* 24; *Woodward v. Marriott*, 1 *Cooper's Ch. R.* (in '37 and '38) 62-68.

An order allowing to the wife temporary alimony and the expenses of her suit, is made without regard to the final decree, or to the question of right upon the merits of the cause.—*Richardson v. Richardson*, 4 Porter, 467; *Bishop on Mar. and D.* 581; *Wright v. Wright*, 1 *Edw.*

Ch. R. 62; 2 Barb. Ch. 265. The order, therefore, can not in the remotest degree affect the final decree, and, I think, can not be before us upon an appeal from the final decree. We have already held, that the final decree in this cause is correct; and if there is a reversal, we have the anomaly in the law of a reversal upon an appeal, when the thing appealed from, and every thing which touches it, is precisely right: we affirm that which is appealed from, and reverse for an independent matter, not appealed from.

This point will be more striking, if we suppose the case of a final decree in favor of the husband, and yet an order allowing temporary alimony and the expenses of suit to the wife. Could the husband, in such a case, appeal from a final decree in his favor, and reverse the orders for alimony and expense money?

Again; the ground upon which the wife is allowed alimony *pendente lite* is, that it being improper for her to cohabit with the husband during the suit, the court must see that she has the means of living while the suit is in progress before it; and the ground upon which the wife is allowed money, with which to defray her expenses of suit, is, that as the husband has all the money, and the wife none, she would be unable to litigate with her husband, unless by the compulsion of the court the husband supplied her with the requisite means.—Bishop on Mar. and D. 569, 571. Now, it seems to me a most singular proposition, that the alimony should be given to the wife to enable her to live during the suit, and the expense-money to carry on the litigation, and yet that those allowances should be subject to revision upon appeal from the final decree. But my brethren think, that the appeal from the final decree brings up all the order compensating the complainant's counsel.

While there is a difference of opinion as to what is brought before us for revision by an appeal from the final decree, the court is unanimous in the opinion, that the order for temporary alimony and the expenses of the suit is revisable. This court revised such an order in *Ex parte King*, (27 Ala. 387;) and such orders were the subject of

frequent revision, on direct appeals from them, in the ecclesiastical court of England.—Rees v. Rees, 3 Phil. 287, 1 E. Ec. R. 418; Shelf. on Mar. and D. 595. While the orders are revisable, the amount of the temporary alimony, depending upon the circumstances in life and social position of the parties, can not be subjected to any definite rule, but necessarily must be left, in a great degree, to the discretion of the chancellor—to the *boni viri arbitrium*; and consequently, it is the uniform practice of revising tribunals to affirm the decree for the maintenance pending the suit, unless there is presented a strong and plain case of error.—Burr v. Burr, 7 Hill, 207; Shelf. on Mar. and D. 595. We cannot say that the chancellor's allowance here presents such a case. Nor do we think the chancellor erred in determining the amount of that allowance without the intervention of a reference, though a reference of the matter would have been the more usual and safe course. The temporary alimony is not restricted to a mere provision for the wife of that which is actually necessary to her living; and consequently, it is not indispensable that the chancellor should have evidence of the cost of the wife's board and clothing, before he pronounces upon the amount of the allowance. Hence, the order has been often made without evidence upon that point, and without a reference to the register.—Rogers' Eccles. Law, 37; Wright v. Wright, 1 Edw. Ch. 62.

The allowance of a solicitor's fee stands upon a different footing. That must be restricted to the actual reasonable value of the services rendered, or to be rendered. The chancellor, therefore, erred in allowing the fees of the wife's solicitors, without proof as to their proper amount, and without an inquiry through the register. The chancellor did not have before him the facts necessary to enable him to determine the amount of the fees. 2 Barb. Ch. Pr. 268.

Though it is the usual and better course for the temporary alimony to be made at an early stage of the cause, it may be made upon the final hearing.—Frankfort v. Frankfort, 3 Curteis, 715, 7 En. Ec. R. 558; Bishop on Mar. and D. § 589.

[8.] Upon the authority of numerous precedents in this court, we will render a judgment, affirming the decree of the chancellor in every respect, except as to the allowance of solicitor's fees; and as to that matter alone, the decree of the court below is reversed, and the cause remanded.—Whitman v. Abernathy, 33 Ala. 154; Saltmarsh v. Smith, 32 *ib.* 404; Reese v. Kirk, 29 *ib.* 406; Pettit's Adm'r v. Pettit's Distributees, 32 *ib.* 288.

The appellant must pay the costs of the appeal.

STONE, J.—The majority of the court differ from the chief-justice only on a single point, necessary to be noticed in this opinion. As the whole court concur in the opinion, that the allowance made to Mrs. Jeter, for alimony, or support *pendente lite*, was not unreasonable; and, as a consequence, hold that, if that question be properly before us, we all unite in affirming the chancellor's decree in that respect,—we need not, and do not, announce any opinion on the question, whether the appeal brings that question before us. Nor do we announce what would be our opinion, if, pending the litigation, and before final decree, the chancellor had ordered Mr. Jeter to pay to Mrs. Jeter's next friend a sum of money to defray the expenses of litigation. That question is not presented by this record.

In the present case, no order was made requiring Mr. Jeter to pay the expenses of the suit, while the litigation was in progress. In the final decree, and only in the final decree, the chancellor ordered that Mr. Jeter should pay for legal services rendered by two law firms, to each firm a specific sum, as a fee in this case. This was done without any reference to ascertain the amount; and the decrees were made directly in favor of the solicitors. There being a final decree in this cause, of which the order in question is a part, from which final decree an appeal is prosecuted, we think this question is properly before us. In thus holding, we think we are supported by many analogies in our system, and that we best pursue the harmonies of our law of appeals. For instance: In a suit in which a divorce is granted, the chancellor frequently makes a final

order as to the custody of the children. So, in suits in which a receiver is appointed, compensation for the services of the receiver is generally decreed. Neither of these orders bears directly on the final decree rendered, and a reversal of them would not, in the one case, impair the force of the decree for divorce; and in the other, would not unsettle the principles of the account, while it might somewhat affect the sum for division. On an appeal from such final decrees, we apprehend no one would deny, that the ruling of the chancellor as to the custody of the children, and in regard to the receiver's compensation, would present a proper subject for revision.—*Garner v. Prewitt*, 32 Ala. 13.

The error of the chancellor on the question of solicitor's fees, has been pointed out by the chief-justice.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application for a rehearing by the appellant's counsel, the following opinion was delivered:

A. J. WALKER, C. J.—A rehearing is sought in this case, upon the ground that the statute now in force does not permit the rendition of a decree for a sum of money in gross to a party obtaining a divorce, but requires that the decree should merely provide for her support and maintenance. This question is covered by the decree in *King v. King*, (28 Ala. 315,) and we might content ourselves by referring to the doctrine of *stare decisis*. But, as we think the decree in *King v. King* can be vindicated by fair reasoning, we prefer not to dispose of the questions raised in a manner so summary.

The section of the Code, under which the decree for a sum of money in gross was rendered in this case, is in the following words: "If the wife has no separate estate, or if it be insufficient for her maintenance, the chancellor, upon granting a divorce, must decree the wife an allowance out of the husband's estate; taking into consideration the value thereof, and the condition of his family." Code, § 1971. Alimony, in the ecclesiastical law, was a provision for the maintenance of the wife; but the defi-

dition of alimony affords no analogy to guide us in the construction of this statute. The reasons why it does not are—that, in England, alimony was never allowed, where there was a divorce *a vinculo*, (Bishop on M. & D. § 563; Godolphin's Ec. Law, 508; Bleeker v. Cooper, 7 S. & R. 500;) and our statute has not used the term "alimony." The court is to make an allowance out of the defendant's estate. The word *allowance*, it is contended, *ex vi termini* implies a stated sum, to be paid from time to time, for the maintenance of the complainant, which must terminate with her death. It must be admitted, that the term is often used in that sense, and is used in that sense in section 1970, which speaks of the provision for the wife's support pending the suit. But then it is susceptible of a much more enlarged signification, and is often used to denote a sum or thing granted or permitted by the law; and indeed, is, frequently used in the Code itself in that sense.—Code, §§ 2556, 2879, 1825. In that sense, we think it was used in the section above quoted; and it may as well embrace the decree of a sum in gross, as of sums payable at stated intervals. Even in reference to alimony *pendente lite*, it is permissible to wait until the final decree, and adjudge to the wife a sum in gross, instead of making allowances from time to time.

The statute of Ohio, upon the same subject, uses precisely the same term that is found in ours; and the supreme court of that State has decided, that under it the court may render a decree for a gross sum, or for installments payable at stated intervals.—Pratt v. Pratt, 9 Ohio, 37.

Judge Stone assents to the result attained, mainly on the authority of King v. King, but does not concur in the reasoning.

The petition for a rehearing is overruled.

NOTE BY REPORTER.—The appellant's counsel afterwards made another application for a rehearing, on the ground that the record showed that the complainant had a separate estate, while it did not appear that the value

of this estate was in any manner shown to the chancellor, or estimated by him in determining the amount of her permanent alimony; and they contended that an allowance out of the husband's estate, for permanent alimony, was only authorized where the wife's separate estate was shown to be insufficient for her maintenance. In opposition to the application, the appellee's counsel adduced affidavits, showing that, since the delivery of the foregoing opinions, all the matters in controversy between the parties, relating to their money and other property, had been compromised, and the agreement of compromise fully executed; and they insisted, that this precluded investigation into the legal question presented by the application. In answer to this application, the following opinion was delivered:

A J. WALKER, C. J.—It appears that Mrs. Jeter had, at the time of the marriage, some property, which, under our statute, became her separate estate. No reference was made to the register, to ascertain the value of this separate estate; nor does it appear that its value was shown to the chancellor, by any evidence taken in the cause. But this objection to the decree was never made, nor was the attention of the court called to the facts alluded to, until after the opinion of the court had been delivered, a petition for rehearing on other grounds overruled, and the parties had, by mutual agreement, made a settlement of all the matters involved in the litigation. On this settlement, the complainant and the defendant made mutual concessions, and the defendant obtained material advantages, to which he was not entitled under the decree of the chancellor. This voluntary settlement, the stipulations of which had been fully performed on both sides, precludes a reconsideration of the cause in this court. But the majority of the court think that, under the circumstances, the decision in this cause should not be construed as settling the rule, that in cases where the wife has a separate estate, a decree for an allowance out of the husband's estate can be sustained on appeal, unless it appears that the value of such separate

estate was shown to the chancellor, either by evidence taken in the cause, or by a report of the register made upon a reference for that purpose.—See Code, § 1971. But I think, that where the disparity between the husband's estate and the separate estate of the wife is so great as appears in this case, the court may take judicial cognizance that the separate estate is not sufficient for the maintenance of the wife; especially as the question of allowance is, by the law, very much a matter of judicial discretion.

GIBBONS vs. MOBILE & GREAT NORTHERN RAILROAD CO.

[BILL IN EQUITY TO ENJOIN COLLECTION OF TAX LEVIED BY MUNICIPAL CORPORATION IN AID OF RAILROAD.]

1. *Constitutionality of statute authorizing municipal corporation to aid railroad company.*—The act of February 8th, 1858, "to authorize the corporate authorities of the city of Mobile to aid in the construction of a railroad, upon a vote of the citizens," (Session Acts 1857-8, p. 165,) and the act supplemental thereto, approved November 29, 1859, (Session Acts 1859-60, p. 294,) are not violative of any constitutional provision; being neither an illegal exercise of the taxing power, nor a taking of private property without just compensation.
2. *Validity of contract between corporate authorities of Mobile and Great Northern Railroad Company, as affected by failure to comply with terms of act of 1858.*—The said act of 1859 having expressly empowered the corporate authorities of Mobile to aid in the construction of the Mobile and Great Northern railroad, by virtue of the vote of the citizens taken under the said act of 1858, the failure of said corporate authorities, in taking the vote of the citizens, to comply with the terms of the said act of 1858, does not affect the validity of their contract with said company.
3. *Same, as affected by fact that city bonds, with interest, exceed amount of aid authorized by said act.*—Nor is the validity of said contract affected by the fact, that the aggregate amount of the bonds issued by

said corporate authorities, with the interest thereon accruing up to the time when they respectively fall due, exceeds one million of dollars, the sum specified in said acts as the maximum of aid to be extended to said railroad company.

4. *Same, as affected by failure to reserve stock for accruing interest on bonds.* Nor is the validity of said contract at all impaired by the failure to require stock in said railroad company to be issued to the assignee or appointee of the city, for the interest it may pay on said bonds.
5. *Same, as affected by levy of tax for payment of bonds.*—Although said acts of 1858 and 1859 only authorized said city authorities to aid said railroad company in one of two ways—*i. e.*, either by direct taxation, or by the issue of city bonds, as might be determined by the vote of the citizens—and not in both ways; yet said city authorities were thereby clothed with the implied power, in the event that the citizens voted in favor of the issue of bonds, to levy a special tax to provide for the payment of the bonds, with interest, as they fell due; and this, moreover, was expressly enjoined on them as a duty by the 13th section of the act of 1843, (Session Acts 1842-3, p. 116.)
6. *Same, as affected by failure to comply with provisions of 9th section of said act of 1843.*—The 9th section of said act of 1843, prohibiting said corporate authorities of Mobile from borrowing money, or creating new debts, “for purposes of profit or improvement,” without the unanimous vote of the boards of aldermen and common council, at a full meeting, concurring with the mayor, is expressly reserved from repeal by the act of 1844, “to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same,” (Session Acts 1843-4, p. 191, § 48.) and is not repealed, or in any manner impaired, by said acts of 1858 and 1859, above cited; nor is said section confined in its operation to the powers which said city authorities were then authorized to exercise. But the issue of bonds under the contract with said railroad company is not, within the meaning of said section, the creation of a new debt “for the purpose of profit or improvement;” consequently, the validity of said contract is not affected by the fact that it was not made at a full meeting of both said boards, and with the unanimous vote of all their members.
7. *Same, as affected by 16th section of said act of 1843, prohibiting contracts between said corporate authorities and individual members.*—Since the contract with said railroad company does not require or authorize any member of the board of aldermen or common council to do any work or perform any service for said corporate authorities, the 16th section of said act of 1843, prohibiting contracts for work or service between said corporate authorities and the individuals composing either board, has no application to the case.
8. *Same, as affected by official oath of corporate authorities.*—If said

contract be a violation of the official oath, as prescribed by the 7th section of said act of 1844, of those aldermen and common councilmen who were at the time stockholders in said railroad company; yet, since the statute does not declare the prohibited act void, nor impose a penalty for its violation, the contract is nevertheless valid in law.

3. *Same, as affected by public policy.*—The fact that several of the aldermen and common councilmen were, at the time said contract was entered into, stockholders in said railroad company, does not, *per se*, invalidate said contract.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. MILTON J. SAFFOLD.

THE bill in this case was filed by Lyman Gibbons and others, on behalf of themselves and all other tax-payers of the city of Mobile who might come in and contribute to the expenses of the suit, against the Mobile and Great Northern Railroad Company, the corporate authorities of the city of Mobile, and the city tax-collector; and sought to cancel and annul a contract, which had been entered into between said corporate authorities and said railroad company, and which is hereinafter set out, and to perpetually enjoin the collection of a tax, which said corporate authorities had levied to pay the city bonds issued under said contract. The said railroad company was incorporated by an act of the legislature of this State, approved February 15, 1856; and its charter was afterwards amended, by allowing it a longer time to complete the construction of its road, by an act approved February 8, 1858.—See Session Acts 1855-6, p. 278; *ib.* 1857-8, p. 163. The contract sought to be canceled and annulled was in the following words:

“This contract, made and agreed upon this — day of December, 1859, by and between the Mayor, Aldermen and Common Council of the city of Mobile, of the one part, and the Mobile and Great Northern Railroad Company, a company chartered and incorporated by an act of the legislature of the State of Alabama, approved on the 15th day of February, 1856, of the other part, *witnesseth*, That whereas the Mayor, Aldermen and Common Coun-

oil of Mobile, under and by virtue of two certain acts of the legislature of the State of Alabama, approved respectively, on the 8th February, 1858, and on the — day of November, 1859; and by virtue of the vote of the people of the city, taken on the 21st day of March, 1859, are fully authorized and empowered to aid in the construction of the Mobile and Great Northern railroad, by the issuance of the bonds of said city, for an amount not exceeding one million of dollars, under such contract with said Mobile and Great Northern Railroad Company as said city authorities may agree upon: Now, the said Mayor, Aldermen and Common Council of Mobile, under and in pursuance of the authority aforesaid, have contracted and agreed, and do hereby contract and agree, to and with said Mobile and Great Northern Railroad Company, to aid said company in the construction of their said railroad, to the extent, and in the manner, and upon the terms, covenants and stipulations in the following articles mentioned:

“*Art. 1.* The said Mayor, Aldermen and Common Council of Mobile have agreed, and do hereby agree, to issue and deliver to said Mobile and Great Northern Railroad Company, on or before the 2d day of January next, or as soon thereafter as practicable, one million of dollars of their bonds; said bonds to be properly made and executed under the seal of the city of Mobile, payable at the Merchants' Bank of New York, in the city of New York, to the order of the Mobile and Great Northern Railroad Company—that is to say, one thousand bonds of said city of Mobile, for the sum of one thousand dollars each, bearing date the 31st day of December, 1859, and to become due and payable at the dates and times mentioned in the second article of this contract; bearing interest at the rate of eight per cent. *per annum*, payable semi-annually, on the first days of January and July of each year, until the maturity of said bonds; for which interest, proper coupons shall be attached to each bond; which coupons shall be made payable in the city of Mobile, or New York, or Charleston, as may be designated in the same by said railroad company, as hereinafter provided.

"*Art. 2.* The said Mayor, Aldermen and Common Council covenant and agree with said Mobile and Great Northern Railroad Company, that said bonds, so to be issued by said city authorities, shall be so worded and expressed as to make the same payable at the times and dates following—that is to say:

15	of said bonds shall be made payable on	1st Jan. 1861;
16	" " "	1st Jan. 1862;
17	" " "	1st Jan. 1863;
18	" " "	1st Jan. 1864;
20	" " "	1st Jan. 1865;
21	" " "	1st Jan. 1866;
23	" " "	1st Jan. 1867;
25	" " "	1st Jan. 1868;
27	" " "	1st Jan. 1869;
29	" " "	1st Jan. 1870;
31	" " "	1st Jan. 1871;
34	" " "	1st Jan. 1872;
37	" " "	1st Jan. 1873;
40	" " "	1st Jan. 1874;
43	" " "	1st Jan. 1875;
46	" " "	1st Jan. 1876;
50	" " "	1st Jan. 1877;
54	" " "	1st Jan. 1878;
58	" " "	1st Jan. 1879;
63	" " "	1st Jan. 1880;
68	" " "	1st Jan. 1881;
73	" " "	1st Jan. 1882;
79	" " "	1st Jan. 1883;
85	" " "	1st Jan. 1884;
28	" " "	1st Jan. 1885;

"*Art. 3.* Whereas the said railroad is designed and intended to promote and sustain the general benefit and business of the city of Mobile, and of all the citizens thereof, the said Mayor, Aldermen and Common Council have agreed, and do hereby agree and contract with said railroad company, that they will annually, from and after the first day of January, 1860, provide the sum of ninety-five thousand dollars, until the said railroad company shall be able, as hereinafter mentioned, to provide from

the net surplus earnings of said road a like sum of ninety-five thousand dollars; said sum to be applied to the payment of said bonds in their proper order, as the same shall become due, and to the payment of the coupons attached to such of said bonds as may be unpaid, whether sold, or in the possession of said company; and said Mayor, Aldermen and Common Council agree and bind themselves, that they will, under and in pursuance of said acts of the legislature of the State of Alabama, adopt such by-laws and resolutions as may be necessary and proper for the levy and collection, by a special tax, of said sum of ninety-five thousand dollars, until said railroad company shall be able, from the net surplus earnings of said road, to provide a like sum, as before mentioned, and hereinafter more fully expressed; and the said sum shall be by them annually, from and after the first day of January, 1860, during the time aforesaid, so levied, collected and applied to the payment of said coupons and said bonds, as aforesaid, in the manner following—that is to say, the said sum, as the same may be collected by the tax-collector or other proper officer, shall be placed as a special deposit in the Bank of Mobile, to be by said bank applied to the payment of said coupons and bonds, as the same may mature or become due; and said corporate authorities agree and bind themselves, to provide and pay to said bank such further sum as said bank may charge as exchange for the payment of said coupons and said bonds.

“*Art. 4.* It is mutually agreed, by and between said parties hereto, that for all of such bonds as may be redeemed or paid by said Mayor, Aldermen and Common Council, as mentioned in the preceding article, the said railroad company shall issue a like amount of the capital stock of said company, to any person or persons to whom said corporate authorities may direct such stock to be issued; it being deemed best that the capital stock of said company shall be and remain in the hands of individuals, rather than in the hands of the corporate authorities of said city.

“*Art. 5.* The said Mobile and Great Northern Railroad

Company covenants and agrees with the said Mayor, Aldermen and Common Council, that said bonds shall be sold and disposed of to the best advantage, and at the highest rate that can be obtained for the same; and that the proceeds arising from such sales, and all funds derived from said bonds before the sale thereof, together with all funds derived from the subscriptions for capital stock in said company, shall be faithfully applied to the construction and equipment of said road. And said company further covenants and agrees, that the whole of the net surplus earnings of said road, and all other funds of said company, however raised or derived, shall be applied to the completion of said road and the equipment thereof, until the construction account and the account for the first efficient equipment thereof can be properly closed and paid, in pursuance of the terms and stipulations of this agreement, hereinafter provided in the eighth and ninth articles of this contract.

“*Art. 6.* It is understood and agreed, by and between the parties hereto, that said railroad company, or any properly authorized agent of said company, for the purpose of aiding in the sale of said bonds, may fill up the coupons attached thereto, so as to make the same payable at the Bank of Mobile in Mobile, at the Merchants' Bank of New York in New York, or at the Bank of Charleston in Charleston; and due notice shall be given to said corporate authorities of all sales of said bonds, to whom sold, and at what rates, and the amount of said coupons made payable, as aforesaid, at either of said places before named.

“*Art. 7.* The sole object and intention of said corporate authorities of Mobile, in undertaking to aid said railroad company in the construction and equipment of said road, being to bring as much of the trade, traffic and business passing over the same as may be practicable within and to the city of Mobile, it is agreed and understood, that the southern terminus and depots of said road shall be within said city, west of the Mobile river; and there shall, at no time after the final completion of said road, be located or established on the line thereof, outside

of the limits of said city, any depot or place of public business, within five miles of the navigable waters emptying into the bay of Mobile; *provided*, said company may receive and discharge any and all materials that may be necessary for the construction and maintenance of the road, at any point or points on the line of said road. And said railroad company covenants and expressly agrees with said corporate authorities, that there shall not, from and after the first day of January, 1863, be continued, established, or kept up, any depot, station, or place of public business of said railroad company, at or on the east bank of the Tensas river, (whether said road may be in operation and running into said city, or not, on the first day of January, 1863,) without the express assent of the said corporate authorities to the further continuance of such depot or place of business.

“Art. 8. The said Mobile and Great Northern Railroad Company covenants and agrees with the said Mayor, Aldermen and Common Council, that after full payment of all debts and liabilities of said company (other than the liabilities of said company to the corporate authorities of Mobile by reason of the premises) that may be made and contracted by said company for the building, completion, and first efficient equipment of said road, (including the warehouses, depots, and station buildings, and repair and construction shops requisite for the business thereof,) the said company, after keeping said road in good repair and sufficient equipment for its efficient operation, shall and will, annually thereafter, provide a like sum of ninety-five thousand dollars, to be applied to the payment of said coupons and bonds, as the same may become due; and the said sum shall be placed by said company as a special deposit in the Bank of Mobile, as the same may be earned by said road, to be applied by said bank to the payment of said coupons and bonds as the same may become due as aforesaid; and said railroad company further agrees to provide and pay to said bank such further sum as said bank may charge as exchange for making said payments; *provided*, the net surplus earnings of said road, after keeping the same in

good repair and efficient operation as above mentioned, shall be sufficient for the payment of said ninety-five thousand dollars annually and said exchange to said bank as aforesaid. But, should the net surplus earnings of said road not be sufficient to pay said sum of ninety-five thousand dollars annually and said exchange to said bank, then, and in such case, the whole surplus earnings of said road shall be paid over to such person or persons as said corporate authorities may, by resolution duly passed and approved, direct, to be applied to the payment of said coupons and bonds.

“*Art. 9.* It is mutually understood and agreed, between the parties hereto, that the construction account, and the account for the first efficient equipment of said railroad, shall be closed whenever, in the opinion of the chief engineer of said company, said road is properly built and equipped for the efficient operation thereof; and in case the said corporate authorities of the city of Mobile shall not be satisfied with the opinion of said chief engineer, and in case the parties hereto shall be unable to agree when said accounts shall be closed, these questions, or either of them, shall be referred to two civil engineers, one of whom shall be chosen by each party; and in case the persons thus selected shall be unable to agree, they shall select a third person, and the award of any two of the persons so chosen shall be binding and final.

“*Art. 10.* Inasmuch as the corporate authorities of the city of Mobile will have a direct interest in having the means arising from the sale of said bonds, and all other means of said railroad company, faithfully and properly applied to the building and equipment of said railroad, and will have a continued interest in the administration of the affairs and funds of said company, until the maturity and payment of said bonds, said company agrees and binds itself to render to said corporate authorities a full statement, annually, of the application of all the means thereof; and further, that their books and accounts shall at all times, until the maturity and payment of said bonds, be open to the examination of the mayor, or of

any person he may appoint to examine the same, for the information of said corporate authorities.

“*Art. 11.* The said Mobile and Great Northern Railroad Company agrees and covenants with the said Mayor, Aldermen, and Common Council of Mobile, that said railroad shall be built as speedily and as rapidly to the completion thereof as may be practicable, having due reference to the best interests of said railroad company and of said city of Mobile.

“*Art. 12.* The said Mayor, Aldermen and Common Council of Mobile covenant and agree with said railroad company, that the said road, and any lands the said railroad company may acquire or hereafter own, within the limits of said city, for depots, stations, warehouses or workshops, shall continue to be assessed and taxed by said corporate authorities, at the present assessed value of said lands, wheresoever situate in said city; and that no greater tax shall be levied or collected on said road or such lands, by reason of any depots, depot-buildings, warehouses, or work or repair-shops, being erected on the same by said railroad company, until said railroad shall pay or divide a dividend among the stockholders thereof.

“*Art. 13.* The Mobile and Great Northern Railroad Company agrees and covenants, that said company shall and will, whenever required by said Mayor, Aldermen and Common Council of Mobile, make and execute, under the proper seal of said company, a deed of trust to such person or persons as said corporate authorities may name, of all the property and effects of said company which it may purchase or acquire by reason of any funds derived from the sale of said bonds, or from subscriptions to the capital stock, or the earnings of its road, in order to secure to said corporate authorities the faithful performance of all the stipulations and covenants to be done and performed on the part of said railroad company according to the terms of this contract; and which said deed shall recite this contract, and be so drawn as to give to said trustees, in case the said company shall fail for two years to perform the covenants and stipulations of

this contract on its part, the power to seize and take possession of all the property so conveyed, when directed to do so, by resolution duly passed and approved, by the said corporate authorities, and the same to sell to the highest and best bidder, upon giving four months notice, by publication in one or more of the newspapers published in the city of Mobile, and such other notice as said trustees may think proper and expedient, of the time and place of such sale, and upon such terms as to payment as the said parties hereto may agree upon; *provided*, said corporate authorities should prefer to have said road, with its said property and equipments, so sold and disposed of, rather than to take the net surplus earnings of said road, to be paid over to them as hereinbefore provided. *Provided*, it is expressly understood and agreed, that the said company shall have the right and power to create a lien or liens superior to, and to take precedence of, any rights of said city under this contract, or any lien created or deed of trust executed in pursuance hereof, by a mortgage or mortgages of said road and all its property and effects, and of the income and earnings thereof, to the extent of three hundred thousand dollars, for the purpose only of enabling said company, by the aid of such funds arising from such mortgage or mortgages, more efficiently to proceed with the construction, building and equipment of said road.

"Art. 14. It is mutually understood and agreed, between the parties hereto, that in case any variance or dispute should hereafter arise between them, as to the proper construction of this contract, or of any article or part thereof, or any other variance or dispute growing out of the respective obligations of one party to the other under the terms and stipulations of this contract, other than the questions a mode of settlement of which is provided in the ninth article of this contract, all such questions or disputes shall be referred to two competent persons, one to be selected by each of the parties hereto; and in case the persons thus selected shall be unable to agree, they shall select a third person, and the award of any two of the persons so chosen shall be final and binding.

"This contract shall be binding and obligatory on the said Mayor, Aldermen and Common Council of Mobile and the said Mobile and Great Northern Railroad Company, whenever it shall be adopted and ratified by proper resolutions duly passed by the boards of aldermen and common council, approved by the mayor, and adopted and ratified by resolutions duly passed by the board of president and directors of said Mobile and Great Northern Railroad Company; and this contract, when so adopted and ratified, shall be signed by the mayor of said city, and properly attested under the seal of the Mayor, Aldermen and Common Council of Mobile, and shall be signed by the president, and properly attested under the seal of the said Mobile and Great Northern Railroad Company."

(Signed and attested, as above prescribed, on the 27th December, 1859.)

The acts of 1858 and 1859, referred to in the foregoing contract, are in the following words:

"An Act to authorize the corporate authorities of the city of Mobile to aid in the construction of a railroad upon a vote of the citizens. Approved February 8, 1858.

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened, That the corporate authorities of the city of Mobile shall have authority to aid in the construction of a railroad north-eastwardly from the city of Mobile, either by taxation upon all property subject to taxation, at a rate not exceeding two per cent. per annum, for five years, or by the issue of city bonds, for an amount not exceeding one million dollars, under such contract with the company to be aided as the said city authorities may agree upon; provided, that before such tax shall be levied, or such bonds shall be issued, they shall submit to a vote of the persons subject to be taxed, under such regulations as they shall deem just and proper, the questions, whether such railroad shall be so aided, what railroad company shall be so aided, [and] by what means—taxation, or bonds; and the said corporate authorities shall be gov-*

erned by the vote of the persons above specified on these questions, and may pass such ordinances as may be necessary to carry out the true intent and meaning of this act."

"An Act supplemental to, and in enlargement of, 'An Act to authorize the corporate authorities of the city of Mobile to aid in the construction of a railroad upon a vote of the citizens,' approved February 8th, 1858. Approved November 29, 1859.

"SECTION 1. *Be it enacted by the senate and house of representatives of the State of Alabama, in general assembly convened,* That the vote of the people of the city of Mobile, taken on the 21st March, 1859, under an act of the legislature of Alabama approved the 8th February, 1858, entitled 'An act to authorize the corporate authorities of the city of Mobile to aid in the construction of a railroad upon a vote of the citizens,' shall be sufficient authority to the corporate authorities of said city of Mobile, and they are hereby authorized and empowered to aid in the construction of the Mobile and Great Northern railroad, by the issuance of the bonds of said city, for an amount not exceeding one million dollars, under such contract with said Mobile and Great Northern Railroad Company as said city authorities may agree upon.

"SECTION 2. *Be it further enacted,* That the corporate authorities of said city of Mobile shall have, and they are hereby invested with, power and authority to adopt such by-laws and resolutions, and to provide such ways and means, and to do such acts as shall be necessary and proper for the full execution and performance of such contract as they may make with said Mobile and Great Northern Railroad Company, under and by virtue of this act and the one to which it is an amendment and supplement.

"SECTION 3. *Be it further enacted,* that all laws and parts of laws, inconsistent [with] and contrary to this act, be, and the same are hereby repealed."

The ordinance of said corporate authorities of Mobile, under which the tax sought to be enjoined was levied, is

entitled "An Ordinance to provide for the payment of the railroad bond debt;" and, after reciting the provisions of said acts of 1858 and 1859, above copied, and the stipulations of said contract with the railroad company, contains the following provisions.

"SECTION 1. *Be it ordained*, That under and in pursuance of said acts of the legislature of the State of Alabama, and in pursuance of the terms, stipulations and agreements of said contract with said railroad company, there shall for the year 1860, and annually thereafter, be levied and collected a special and separate tax upon the assessed value of all taxable property in the city of Mobile, in addition to the tax now authorized to be collected; and a court of assessment, composed of the mayor and presidents of the boards of aldermen and common council, shall annually fix the rate and per cent. of such tax; which shall be at such rate as will raise and secure the said sum of ninety-five thousand dollars annually, and such sum as will be sufficient to pay such exchanges as may be charged by said Bank of Mobile for the payment of said coupons and bonds.

"SECTION 2. *Be it further ordained*, That there shall be opened on the books of the treasurer an account, to be known and styled as the railroad-bond-debt account; and the said account shall be credited with all moneys deposited by the city tax-collector in the Bank of Mobile, as hereinafter provided for; and said account shall be debited with all bonds and coupons, as they are paid and returned to his office, making annual reports of the same.

"SECTION 3. *Be it further ordained*, That the said taxes, to be raised under the authority of this ordinance, and of the aforesaid acts of the legislature, are hereby pledged to the payment of said bonds and the interest coupons thereto attached, as the same may become due; and it is hereby made the duty of the city tax-collector and his successors in office, to deposit weekly in the Bank of Mobile, to the credit of said railroad bond debt, all moneys which he may collect under the authority of this ordinance and of said acts of the legislature, save and except such amount of commission as he may be allowed

by this ordinance, which amount said tax-collector is hereby authorized to deduct from his weekly deposits in said Bank of Mobile; and it shall be the duty of said tax-collector to make weekly returns, or reports, of all moneys so collected by him, to the boards of aldermen and common council; and it shall be the duty of the treasurer of the city of Mobile to have semi-annual settlements with said bank, of all moneys so deposited by the tax-collector, and of all payments made by said bank on account of said bonds and coupons; and the said bank is hereby fully authorized and empowered to pay from the deposit made under this ordinance all of said coupons for interest on said bonds as they mature, and cancel the same forthwith, and return the same upon settlement to the city treasurer; and said bank shall keep account of the deposits and payments made out of said special fund.

“SECTION 4. *Be it further ordained*, That said special tax shall be so annually levied, collected, and applied to the payment of said coupons and bonds, until the said railroad company shall be able to provide the requisite sum of ninety-five thousand dollars annually, from its net surplus earnings, and to pay the amount charged by the Bank of Mobile as exchange, in pursuance of the stipulations of said contract.

“SECTION 5. *Be it further ordained*, That the city tax-collector, before proceeding to the collection of said special tax, shall give bond, payable to the Mayor, Aldermen and Common Council of Mobile, with two sufficient sureties, in the sum of thirty thousand dollars, for the faithful performance of the duties imposed upon him by this ordinance; and shall receive as compensation for the performance of the same one per cent. upon the amount of his collections.”

The bill alleged, that the vote taken on the 21st March, 1859, under the direction of said corporate authorities of Mobile, was not taken in conformity with the requirements of said act of 1858, inasmuch as all persons were allowed to vote who were entitled, under the laws of the

city, to vote for mayor; that under the contract between said corporate authorities and said railroad company, the former have issued city bonds, as specified in said contract, to the amount of one million dollars, exclusive of interest, and have delivered said bonds to said railroad company, who holds them as a debt against the city, and have levied a tax of 35-100 of one per cent., on all property subject to taxation within the city limits, to pay the sum which, under the provisions of said contract, they agreed to pay for the year 1860; that at the time this contract was made by said corporate authorities, there was not a full attendance of both boards, as required by the ninth section of the act of 1843, hereinafter referred to, but there was one vacancy, one member of each board was absent, and there was one dissenting vote in each board; that twenty-one out of the twenty-eight persons composing said two boards, were at the time stockholders in said railroad company; that said contract insures the completion of said railroad, thereby enhancing the value of the stock, and otherwise benefiting the individual stockholders, while it creates a large debt against the city without any consideration, and imposes a heavy burden on the tax-payers, without any corresponding benefit. The complainants charged, that said acts of 1858 and 1859 were unconstitutional; and that said contract was without consideration, was illegal, and void on grounds of public policy; and prayed that the contract might be annulled, the bonds canceled, and the collection of the tax perpetually enjoined,

The act of 1843, above referred to, is the act approved February 11th, 1843, entitled "An act to enable the corporate authorities of the city of Mobile to provide for the security and payment of the debts of said city, and for other purposes."—Session Acts 1842-3, p. 113. The case also involves the construction of some provisions of the act approved January 15, 1844, entitled "An act to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same."—Session Acts 1843-4, p. 175. As the material portions of both these acts are quoted at length in the subjoined briefs of coun-

sel, and in the opinion of the court, it is unnecessary to repeat them in this place. The acts of 1858 and 1859, above copied, the acts incorporating said railroad company and amending its charter, the contract between the corporate authorities of Mobile and said railroad company, and the city ordinance providing for the payment of the bonds, were all made exhibits to the bill.

Separate answers were filed by said railroad company and said corporate authorities, which were, however, substantially the same. Each admitted all the allegations of the bill, as to the facts connected with the contract; but denied all its charges, as to the validity of the contract, the constitutionality of the laws under which said contract was made, and the legality of the tax. The legal points presented by the answers are stated in the briefs of counsel.

The chancellor dissolved the injunction, on motion, after the filing of the answers; and his decree is now assigned as error.

The cause was argued at the bar, and printed argument were also submitted, by E. S. DARGAN, P. HAMILTON, and JOHN T. TAYLOR, for the appellants; and by R. H. SMITH, A. R. MANNING, and ANDERSON & BOYLES, for the appellees. The limits of a report admit only of the publication of a condensed statement of the points and authorities presented on each side.

Points and authorities for the appellants.

1. The city authorities of Mobile had no general power, as a municipal corporation, to make the contract and levy the tax here complained of.—City Council of Montgomery v. M. & W. Plank-road Co., 31 Ala. 76. If said contract and tax can be sustained at all, it must be under the authority conferred on said municipal authorities by the acts of 1858 and 1859.

2. The contract is not warranted by said acts of 1858 and 1859. The answers admit, that the vote taken under the act of 1858, not being confined to the persons subject to be taxed, did not conform to the requirements of said act; and that no contract with the railroad company

was made under that act; and they rest the validity of said contract on the act of 1859. The act of 1858 conferred (or was intended to confer) the power to aid the railroad company, *either* by taxation, *or* by the issue of bonds, as might be determined by a vote of the citizens; while the act of 1859 repeals the power to aid by taxation, and, like the former act, limits the aid to be extended by bonds to one million dollars. In both of these particulars, the contract violates provisions of the act of 1859. Although the nominal amount of the bonds is only one million, yet the interest to be paid on the coupons swells the aggregate of the city obligations to two millions three hundred and seventy-five thousand dollars. As obligations to enforce the payment of money, coupons are equally as binding as bonds, and may be reduced to judgment in the same manner. Express power to raise one million dollars of bonds, certainly cannot include an implied power to issue more than that amount of other obligations in addition thereto; and such implied power is not to be assumed from inference and construction. 7 Amer. Law Register, 725; 8 *ib.* 271. The same objection applies to the provision of the contract binding the city to the payment of exchange on coupons and bonds; and in a greater degree, because the statute gave no authority to provide for payment in New York, or elsewhere than in Mobile. Although taxation was repudiated by the vote of the citizens, and the power to tax was repealed by the act of 1859; yet this contract imposes on the tax-payers an onerous amount of taxation, for a period five times as great as that authorized by the former act of 1858. To say that taxation is necessary to give value and character to the bonds, and that the city has no means of payment other than by taxation, is no answer to this objection, but simply shows the error in the construction of the acts adopted by the city authorities. The true construction of said act, whether considered by itself alone, or in connection with the act of 1858, is simply this—the city authorities were authorized *to loan* the credit of the city to the railroad company to the extent of a million dollars. *To aid*, is to assist, to stand by and sup-

port; not to give, to become parcel of, or incorporated with. The term *aid*, as applied to railroads, has a settled legislative meaning in this State, and is synonymous with loan.—See Session Acts 1851-2, p. 209; *ib.* 1853-4, p. 36; and other similar acts.

3. If said contract and tax be in perfect accordance with the provisions of the act of 1859, they are nevertheless illegal, because they are violative of several provisions of the act of 1843.—Session Acts 1842-3, p. 113. The 9th section of said act of 1843 declares, that the corporate authorities of Mobile shall not thereafter “be permitted to purchase real estate, or borrow money, or create any new debt, for purposes of profit or improvement, without a concurrence of the mayor and boards of aldermen and common council, at their regular meetings, upon a full attendance of all the members of both boards, at a time when there shall be no vacancy in either, and none dissenting to the act;” and further, “that any contract, made in violation of this act, shall be wholly null and void.” The answers in this case admit that, at the time said contract was adopted by the municipal authorities, there was a vacancy in one board, an absent member in the other, and one dissenting vote in each; and further, to escape the charge of unconstitutionality, alleged against the act of 1859, admit and insist that the debt thereby imposed on the city was created for the profit and improvement of the city. The contract, then, is plainly violative of the 9th section of said act of 1843, which uses the most general language that could be employed; forbidding the creation of a new debt—that is, of all new debts, without qualification, limitation, or restriction—for purposes of profit or improvement.

4. This section of the act of 1843 is unrepealed by any statute since passed. The 49th section of the act of 15th January, 1844, “To consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same,” expressly leaves it unrepealed.—Session Acts 1843 4, p. 191. The act of 1858 contains no repealing clause. The 3d section of the act of 1859 repeals “all laws, and parts of laws, inconsistent and contrary to this act;”

which effects nothing, because a subsequent act, without such express repealing clause, repeals all preceding statutes so inconsistent that they cannot stand together. *Rawls v. Kennedy*, 23 Ala. 249. If, then, the act of 1843 be repealed by that of 1859, it must be by implication; a mode of repeal never favored by the courts, and only allowed when the repugnancy between the two statutes is absolute and incontrovertible.—23 Ala. 249; 29 Ala. 451; 33 Ala. 693; 24 Pick. 297; 3 Gill, 138; 2 Cranch, 358; 6 Barbour, 60. But there is no inconsistency or repugnancy between the acts of 1843 and 1859 in this particular: on the contrary, the 9th section of the former might have been incorporated as a distinct provision in the latter. The act of 1859 gives a power, but says nothing as to the manner of its exercise; while the act of 1843 simply prescribes the mode in which that power shall be exercised. Moreover, the rule of construction applies, that special provisions are not repealed by general provisions on the same subject.—29 Ala. 573, 583; 2 Penn. 37, 43; 23 Eng. L. & Eq. 389, 392.

5. The pleadings in this case, in connection with the history of the said act of 1843, show a special reason why said act should not be held repealed by implication; in fact, that it partakes of the character and obligation of a contract. At the time of its passage, the city of Mobile was insolvent; without money, property, or credit, and its effects had been assigned for the benefit of its creditors. Appealing to the liberality of its creditors, a plan of settlement was proposed and adopted, which received the sanction of the legislature in the act of 1843. The 15th section of the act required the creditors to file with the mayor their written assent to the provisions of the act, before the city should become bound to carry out the duties imposed on it. The creditors did so—gave up their former evidences of debt, and received new bonds to the amount of seven hundred thousand dollars, which refer to said acts as part and parcel thereof; and of these bonds, which were received by the creditors on the faith of the security afforded by the act, more than five hundred thousand dollars are now outstanding, and mature in 1863

6. The acts of 1858 and 1859 are unconstitutional, being violative of the 1st and 13th sections of the bill of rights; the former declaring, that "no set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services;" and the latter, that private "property shall not be taken or applied to public use, unless just compensation be made therefor." The object of the latter section was, to restrain the legislature in taking *private* property for *public* use; of the former, to restrain them from taking *public* money, emoluments, etc., for *private* use, or bestowing *public* rights on *private* persons. The contract in this case, if it be justified by the acts of 1858 and 1859, raises public emoluments, and gives them to the stockholders of the railroad company: it collects funds from the public, and invests them in the railroad, which belongs to the stockholders; and the public has no participation in the privileges conferred on the stockholders. To say that the road is a great public benefit, is no answer to this objection. *That* was the ground on which its charter was granted, and on which alone it can be sustained. That the company is now unable to perform the public benefit for which it was created, simply shows a forfeiture of its charter, instead of affording a reason for conferring on it additional privileges. If the road be finished by the aid of these funds, and prove to be of public benefit and advantage, that benefit will have been secured by the money of the taxpayer, equally with that of the stockholder, while the latter reaps all the advantages.

The protection of property is one of the first objects for which governments are instituted, and second only to the protection of life and liberty; and it is secured by an express provision of the fundamental law, to which alone the courts must look in determining the validity of laws. The money of the appellants in this case has been taken from them, against their consent, and without compensation, and has been bestowed upon a private corporation. If just compensation had been made to them, the act would have been unauthorized, because the use to which the money is applied is not public. A railroad has all

the constituents of private property, and the company to which it belongs is a private corporation.—*Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 29 Ala. 221; *Angell & Ames on Corporations*, 23-4, and cases cited. If the railroad could be held a public use, within the meaning of the bill of rights, the act would still be unconstitutional, because just compensation was not made for the property so taken. The amount of tax levied on each citizen, though small, does not affect the principle. If thirty-five hundredths of one per cent. can be lawfully exacted, there is no limit to the power exercised: ten, twenty, or fifty per cent. might with equal propriety be exacted. The aggregate amount paid by the citizens, builds the road in effect, for the amount paid in by the stockholders is comparatively insignificant; and yet the tax-payer receives no interest in the property or franchises of the railroad company, and has no voice in the management of its affairs.

The validity of these laws cannot be maintained under the taxing power of the State. The right of taxation, inherent in every government, is admitted to be without express qualification. But it must necessarily be restrained to the legitimate objects of taxation; otherwise, there is no security to private property, and no distinction between absolute and limited governments. A tax is a levy made for the public service, or a sum collected by public authority to enable the government to discharge its duties; and carries with it the idea of a public due. It is not contended, that the right of taxation is confined to the necessary expenses of the government, or to the mere machinery by which government is carried on; but that it does not include every species of exaction, which, under the name of a tax, may be authorized by the legislature for the purposes of internal improvement, or for the benefit of private corporations, on the idea that commerce or public convenience will be promoted by their undertakings. Public opinion is often in error as to great commercial undertakings: witness the South Sea bubble in England, and the experiment of Alabama in banking. If the legislature may authorize forced contributions under the name of a tax, for the purpose of building a rail-

road belonging to a private corporation, why may it not also tax the public to build a line of boats between Mobile and Montgomery? why not tax Montgomery with the entire cost of the capitol? or Coosa and Autauga with the entire cost of the penitentiary? If these be legitimate objects of taxation, the burden must be borne by all the people of the State equally.

The case of *Stein v. Mayor of Mobile*, 24 Ala. 591, is relied on by the appellees, as precluding inquiry into this constitutional question. But that case is distinguishable from this, in two particulars: there, the tax was imposed with the direct assent of nearly all the tax-payers, and the tax-payer was entitled to receive stock for the money paid by him; here, the tax-payer receives no compensation for his money, and it is taken from him without his consent. Although a vote of the citizens was taken under the act of 1858, it was not a vote of the tax-payers, as required by that act; nor was any vote of the tax-payers ever taken. The fact that Stein voted against the tax, does not destroy the force of the distinction; since the rule in regard to all partnerships and corporate bodies allows the majority to bind the minority by contracts. *Grant on Corporations*, 68-9. Stein's case may be maintained on the ground of contract, and on that alone; but the doctrines there laid down, as to the right of taxation, are, in the view of the appellants, inconsistent with the fundamental principles of the constitution. They therefore ask a reconsideration of that case, and of the authorities on which it is founded, against which there has been a growing dissent; believing that the weight of argument, if not of authority, is against its correctness.—*Sedgwick on Constitutional Law*, 464; 13 B. Monroe, 40-148; 2 Am. Law Register, 27, 65; 5 *ib.* 289; 24 Barbour, 232.

7. The contract should be set aside on grounds of public policy. It is alleged in the bill, and admitted in the answers, that a majority of the aldermen and common-councilmen were stockholders of the railroad company at the time the contract was approved by the city authorities; and it is evident from a consideration of the terms of the contract, that it is highly onerous to the city, and

greatly advantageous to the railroad company—that is, to the individual stockholders. No actual fraud, or bad faith, is imputed to these public agents. The principle invoked by the appellants, who deem the contract injurious to them, does not rest on fraud or bad faith, but on grounds of sound public policy; the principle that forbids a man to be a judge in his own cause, and prohibits a trustee from acting for his private benefit in the matters pertaining to his fiduciary relation.—23 Ala. 85; 27 *ib.* 430; 16 Eng. L. & Eq. 63; 4 How. (U. S.) 554; Law Register, April, 1860, p. 333; Story on Agency, § 210.

8. This objection to the validity of the contract is sustained by express legislative enactment. The 10th section of the act of 1840, (Session Acts 1839–40, p. 54,) requires each individual member of the municipal boards to take an oath, to the effect that he will not, directly or indirectly, be engaged in any contract with the city corporation, or sell to, or buy from it, any article, interest, or matter whatsoever; and declares every contract, other than for efficient services, in which any officer of the corporation shall be interested, wholly void. The 16th section of the act of 1843 declares, “that it shall not be lawful for any member of either board to make any contract with the corporation to do any work, or perform any service for the same; nor shall any appropriation be valid that shall be made for this.”—Session Acts 1842–3, p. 119. The same official oath is prescribed by the 7th section of the act of 1844.—Session Acts 1843–4, p. 178. Under these statutory provisions, the contract is clearly void.—*Bell v. Quin*, 2 Sandf. 146. The 10th section of the act of 1840 is not repealed by either of the subsequent acts; there being no express repealing clause, nor any repugnancy between the two statutes.—Authorities cited in 4th paragraph, *supra*. Nor are any of these statutes repealed by the acts of 1858 and 1859. The authority conferred by these acts can be exercised without the repeal of the former laws. The existence of the corporation does not depend on the fact that its present members compose it; and the power conferred is vested in the corporation, though it cannot be exercised by its present members.

Points and authorities for the appellees.

1. The contract and tax are authorized by the act of 1859. Although the vote taken under the act of 1858 was extended to all qualified electors for municipal officers, yet, in effect, it was limited to tax-payers, who alone are authorized to vote for mayor and aldermen.—Municipal Code, p. 6, § 6. If the vote had not been in strict conformity with the requirements of the act of 1858, the irregularity would not have affected the validity of the contract; for the act of 1859, “in enlargement of” the former act, by express provision, makes that vote sufficient authority to the mayor and aldermen to enter into such contract with the railroad company as they might think proper. The act evidently contemplates, that the amount of present aid extended to the railroad company shall be one million of dollars; and this amount of present aid could be rendered, with greatest ease to the tax-payers, only by the issue of bonds payable at a future day, with interest from date. The payment of these bonds, with interest, was necessarily secured by taxation, because the city had no other means of payment; and the power to issue the bonds, or to create a debt against the city, includes by necessary implication the power to levy a tax to pay the debt.—1 Sneed, 637; 9 B. Monroe, 154; 13 *ib.* 22; 9 Harris, (Penn. St.) 181; 9 Humph. 552; Amer. Law Register, August, 1858, p. 614; 8 *ib.* 298–300; 7 *ib.* 732.

2. No constitutional provision is violated by the acts of 1858 and 1859, or by the contract made under them. The decision of this court in Stein’s case, (24 Ala. 590,) which is sustained by the great weight of adjudicated cases elsewhere, conclusively establishes these principles: that the taxing power of the State is not confined to the ordinary expenses of the government, or the mere machinery by which it is carried on; that this power may be constitutionally employed by the legislature in the erection of works of internal improvement, limited only in its exercise by the legislative discretion; that railroads are works of internal improvement which may be thus

aided or built, although owned by private corporations; and that this taxing power, for the benefit of a particular railroad, may be delegated by the legislature to a municipal corporation, and its exercise be made dependent on a vote of the citizens.—Talbot v. Dent, 9 B. Monroe, 526; Clark v. Rochester, 24 Barbour, 484; 1 Sneed, 637; Sharpless v. Mayor of Philadelphia, 9 Harris, 175; Slack v. M. & L. Railroad Co., 13 B. Monroe, 1; 4 Smith's (N. Y.) R. 38; 4 Comstock, 419; 9 Humph. 269, 552; 2 Dev. & Bat. 451; Grant v. Courter, 24 Barbour, 240.

3. The validity of the contract is not affected by the fact, that it was not adopted by the unanimous vote of all the members of both boards, at a full and regular meeting, as required by the 9th section of the act of 1843. The act of 1843 was a limitation on powers already possessed by the corporation—on acts purely municipal, and within the powers granted by the city charter. The acts of 1858 and 1859 create new powers not before possessed by the city, and for purposes not within the ordinary objects of city governments; and they give these powers without qualification. The former is a restraining act, limiting powers already possessed by the city; the latter, an enlarging and enabling statute, conferring new powers for a specific purpose. The two acts contemplate neither the same subject-matter nor the same objects, and are not to be construed *in pari materia*. The repeal of the act of 1843, by the act of 1859, does not impair or affect any vested rights. Neither the 9th nor the 13th section confers any rights on creditors of the city. The act contains no covenant on the part of the city to relinquish the taxing power, for the benefit of its then existing creditors; nor could the city thus strip itself of any portion of its legislative power, or limit the discretion of the legislature.—5 Cowen, 542; 2 Term R. 171; Sedgwick on Constitutional Law, 634, and note. If the creditors have a vested interest under the act of 1843, as under an irrepealable law, the complainants are not in a condition to take advantage of it, not being creditors. If they were creditors, the legislature might nevertheless take away the remedy provided by the act of 1843, without

impairing the obligation of the contract.—4 Wheaton, 200; 1 How. (U. S.) 315. Moreover, the act of 1859, although it may increase the taxes of the complainants, does not diminish the value of the creditors' security, nor impair the obligation of their contract.

4. The fact that several of the aldermen and common-councilmen were, at the time the contract was made, stockholders in the railroad company, does not invalidate the contract. The cases cited by the appellants, respecting judges sitting in causes in which they are interested, and trustees dealing with *cestuis que trust*, have no application to the case. In making the contract, the city authorities acted as agents of the State, and were clothed by statute with the power they exercised; and their acts can only be impeached for fraud.—Walker v. Devereux, 4 Paige, 229; Haight v. Day, 1 Johns. Ch. 18. In regard to judges, it has been settled from the time of the year-books to the present day, that when the law imposes on a judge the duty of trying a case, and no one else can do it in his stead, his interest does not disqualify him. Dimes v. Grand Junction Canal Co., 16 Eng. L. & Eq. 72; Ranger v. Great Western Railway Co., 27 *ib.* 35; 1 Dev. & Bat. 307; 2 Barb. Ch. 39; 5 Mass. 92; 13 Mass. 340; 22 Conn. 190. So, in case of necessity, an interested person may testify as a witness.—United States v. Murphy, 16 Peters, 210; 1 Greenl. Ev. (ed. 1858,) § 348; 12 Ala. 592; 4 Paige, 251; 1 Johns. Ch. 18. If, then, the city authorities acted as judges in making the contract, they are within the exception to the general rule; if as legislators, the principle has no application: as well might it be contended, that an act of the legislature, granting a loan to a railroad company, was rendered void by the fact that one of its stockholders was a member of the legislature. There is no statute prohibiting such contract, or declaring it void; and even if it be a violation of the official oath of any members of either board, (which is denied,) that would not render it void, in the absence of an express provision to that effect.—14 Eng. L. & Eq. 306; 76 *ib.* 200; 77 *ib.* 543.

STONE, J.—1. The constitutionality of the legislation, under which the city of Mobile has obliged itself to aid the Great Northern railroad, is assailed, as not being a legitimate exercise of the taxing power, but a taking of private property without just compensation, even if the use for which it is taken be public.

This subject has undergone much and earnest discussion in many of the States composing this Union; and however grave the subject might be regarded, if it were an open question, we feel bound to consider it, in this State, *res adjudicata*. In coming to this conclusion, we are not unmindful of the opinion, which must obtain some credence, that we run counter to some of the arguments and illustrations found in the case of *Sadler v. Langham*, 34 Ala. 311. The principle we are discussing, however, was settled and re-asserted in this court, long before the case of *Sadler v. Langham* came up; and on a question involving such momentous results as does this—one in which the public welfare is so deeply concerned—we feel it our duty to adhere to the rule, *stare decisis*.

In the case of *Stein v. The Mayor of Mobile*, (24 Ala. 591,) a question very like the one we are considering was directly presented. This court reviewed many adjudged cases of sister States, pronounced on the identical question involved in that case and this; and, in a most elaborate opinion, decided, “that the acts authorizing the city authorities of Mobile to levy a tax on the owners of real estate within the limits of the city, to aid in the construction of the Mobile and Ohio railroad, were constitutional;” and that although the only legitimate object of taxation is the support and maintenance of government, yet this purpose embraces a wider range than the mere machinery employed in its administration: that the power authorizes the employment of the necessary appliances to augment the aggregate wealth and prosperity of the inhabitants of the city; and that this may be accomplished by providing outlets for commerce, opening channels of intercommunication with other parts of the State, &c. *The Mayor &c. of Wetumpka v. Winter*, 29 Ala. 651;

Pierce on Railways, 108 to 125, and notes; Redf. on Railways, 533, and notes; Sharpless v. Mayor, 21 Penn. State R. 147; L. & N. Railroad v. County Court, 1 Sneed, 637.

[2.] As a reason why we should reinstate the injunction in this cause, it has been pressed on our consideration, that the terms of the act, approved February 8th, 1858, (Pamphlet Acts, 165,) were not complied with by the city authorities of Mobile. We deem it unnecessary to institute an inquiry into this subject. Before any aid was extended to the railroad, or determined on by the city, under the act of 1858, the act approved November 29th, 1859, was passed, which declared, "that the vote of the people of the city of Mobile, taken on the 21st day of March, 1859, under an act of the legislature of Alabama, approved the 8th of February, 1858, entitled 'An act to authorize the corporate authorities of the city of Mobile to aid in the construction of a railroad upon a vote of its citizens', shall be sufficient authority to the corporate authorities of said city of Mobile, and they are hereby authorized and empowered to aid in the construction of the Mobile and Great Northern railroad", &c. So, whether the act of 1858 was complied with or not, the act of 1859 conferred on the city authorities ample power to aid said railroad, to the extent, and under the terms prescribed by the last mentioned act. Pamph. Acts of 1859-60, p. 294.

[3.] The doctrine is well settled, that to authorize a municipal corporation to take stock in, or aid in the construction of a railroad outside of the limits of such corporation, there must be an express grant of power.—See City Council v. Plank-road Co., 31 Ala. 76; Pierce on Railroads, 108. The power was expressly conferred in this case. It is contended for appellants in this case, that in making their contract, the city authorities transcended the power conferred on them by the statute, in this, that whereas the statute only authorized them to aid in the construction of the railroad by the issue of city bonds, in an amount not exceeding one million of dollars, yet they have in fact issued their bonds and coupons, and furnished them to the railroad, amounting to over two mil-

lions of dollars. This argument is more specious than solid. The bonds are for the precise sum of one million of dollars; no more, no less. These bonds mature at various times, extending from one to twenty-five years. The excess over one million of dollars consists in obligations, in the shape of coupons, to pay interest on the said one million of dollars, until such time or times as the principal of the bonds shall be paid. This, we think, is in strict conformity with the spirit of the statute, which evidently contemplated that the bonds should be interest-bearing, and therefore marketable. Anything less would not have furnished a million of aid to the railroad.

[4.] It is further urged in favor of a reversal of the chancellor's decretal order, that by the terms of the contract between the city government and the railroad, no stock is to be issued to the assignee or appointee of the city, for *the interest* it may pay on the bonds. A full answer to this objection is furnished in the fact, that it would be no objection to the constitutionality of the contract, if no stock had been reserved for either the principal or interest to be paid by the city. The power to aid the railroad resting, as it does, on the taxing functions of the city, and not on the constitutional provision in relation to the taking of private property for public use, no direct pecuniary compensation to the tax-payers is necessary to uphold it.—See *City of Wetumpka v. Winter*, and other authorities *supra*; *Pierce on Railways*, 115.

[5.] It is further objected to the validity of this contract, that while the acts of the legislature, and the vote of the people, authorized aid to the railroad only by bonds, and refused aid by taxation, yet the city authorities have gone beyond this, and aided both by bonds and taxation.

The question submitted to the voters of Mobile, in this connection, was, whether they would aid *by taxation upon all property subject to taxation, at a rate not exceeding two per centum per annum, for five years, or by the issue of city bonds, for an amount not exceeding one million dollars.*—Pamph. Acts 1857–8, 165. The aid determined on and rendered in this case was by bonds, *not exceeding one million dollars,*

and not by taxation, limited in rate to two per centum per annum, and in duration to five years. The fact that a tax was also levied to meet the bonds, does not change the character of the aid furnished, nor violate the provisions of the statute. The real point was, whether aid should be rendered by heavy and rapid assessments, or by the longer and graduated process of city bonds, distributing the burden through a series of years. Such bonds, whenever, and by whatsoever authority issued, are necessarily an interest-bearing fund. They are, also, necessarily, due at some given time. The accruing interest, at the intervals agreed on, and the principal, at the time of the maturity of the bonds, must be paid. The bonds, being debts of the city, in the absence of a stipulation or specification to the contrary, import, *ex vi termini*, a duty resting on the city to meet and liquidate both the interest and principal as they severally accrue. The city authorities, being empowered by the legislature to aid the railroad by bonds, were thereby clothed with the implied power to provide ways and means to meet the liabilities thus incurred, and thus preserve the credit of the city.

In what we have said above, we have considered this question without any reference to legislative restraints resting on the mayor, aldermen and common council of the city of Mobile. The 13th section of the act approved 11th February, 1843, (Pamph. Acts, 116.) declares, "That from and after the first day of November, A. D. one thousand eight hundred and forty-three, and after the issuing of the obligations provided by this act, it shall not be lawful for the corporate authority aforesaid to issue, in any assignable form whatsoever, any bonds, promises to pay, or city orders, or any form whatsoever of promises to pay, transferrable from hand to hand, nor to enter into any contract for the payment of money, unless the means for the payment of the money so contracted to be paid shall be specifically provided at the time of making such contract." The present bonds are covered by said 13th section of the act of 1843; were issued after the 1st day of November, 1843, and after the issuing of the obliga-

tions provided by that act; and it was, therefore, the manifest duty of the city authorities, when they issued these bonds, to provide the means for their payment. If, then, any doubt remained whether the acts of 1858 and 1859 conferred the authority to provide the means for the payment of these bonds and the coupons, that doubt must be dissipated by the 13th section of the act of 1843, which not only confers the right, but enjoins its exercise as an official duty resting on the city authorities.

We go beyond the merits of this case, and assert that, in the exercise of a discretion vested in the city authorities, as to the plan of providing means for the payment of the interest and principal on the bonds issued for the railroad, we are impressed with the prudence and wise economy which seem to have presided in their deliberations. While it is obvious that the burden has been distributed over a period of about twenty-five years, in such manner as that the assessment shall be uniform, and at no time oppressive; the right is preserved of applying, at the end of each year, the accruing surplus to the extinguishment of the principal of the bonds; the surplus, for this purpose, being each year increased, by an amount corresponding with the progressive diminution of the annual interest. In this way, all the trouble, risk and expense of an accumulating sinking-fund have been avoided.

[6.] No question in this case has been pressed on our consideration with more earnestness, than that which arises under the 9th section of the act of 1843.—Pamph. Acts, 115. Its language is: "That the corporate authorities of the city of Mobile, after the passage of this act, shall not be permitted to purchase real estate, or borrow money, or create any new debt, for purposes of profit or improvement, without a concurrence of the mayor and boards of aldermen and common council, at their regular meetings, upon a full attendance of all the members of both boards, at a time when there shall be no vacancy in either, and none dissenting to the act; which facts shall all appear on the minutes of the corporation; and any contract, made in violation of this act, shall be wholly

null and void, incapable of being ratified or confirmed, except in the manner hereinbefore specified."

For the appellants it is contended, that the bonds brought to view in the present record are the creation of *a new debt, for purposes of profit and improvement*; and, inasmuch as the present contract was entered into *without a full attendance of both boards at a time when there was no vacancy in either, and none dissenting to the act*, the argument is that the present contract must fall to the ground. The appellees contend, that if section 9 of the act of 1843 be not repealed, then the provisions of that section must be confined to acts of borrowing money, and the creation of new debts, within the powers of the city government as they then existed; and that that section does not reach or control the exercise of powers conferred on the corporation by subsequent legislation. They contend further, that the acts of 1858 and 1859 confer authority to create a debt for a specified purpose; and that this creation of a new power, without specifying the mode of its exercise, must be understood as so far repealing the 9th section of the act of 1843 as to allow the making of the present contract, in the mode and manner pointed out for the performance of acts of municipal legislation and government.

The act of 15th January, 1844, "to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same," expressly preserves, and exempts from repeal, the act of 11th February, 1843. Pamph. Acts 1843-4, p. 191, § 48. The 9th section of the act of 1843 is not, then, directly or expressly repealed.

We can not assent to the argument, that the acts of 1858 and 1859 repeal, or in any manner impair, the 9th section of the act of 1843. The acts of 1858 and 1859 are silent as to the mode and solemnity which shall attend the official actings and doings of the city authorities, under their provisions. There is no incompatibility between the acts of 1858 and 1859, and the 9th section of the act of 1843. Both can stand together, and each can be executed without trenching on the other. So clearly is this the case, that if section 9 of the act of 1843

were re-enacted as an additional section to the acts of 1858 or 1859, no one would suppose that an incongruity would be thereby presented. If, then, the building of the railroad, in aid of which this contract was entered into, comes within the category of *profit* or *improvement*, as expressed in the 9th section of the act of 1843, this contract must fall to the ground; for it is not pretended that both boards were full,—none absent, and none dissenting.

Neither can we assent to the argument, in its unqualified terms, that the regulations prescribed in section 9 of the act of 1843 must be confined to the powers which the city government was then authorized to exercise. Its language is, “after the passage of this act.” Its terms embrace all the contracts for the purchase of real estate, all borrowings of money, and all contracts by which new debts shall be created. for purposes of profit or improvement. If the language of the act of 1843 had been, that the city authorities should not borrow money, nor create any new debt, *except for the maintenance of the city government*, we should unhesitatingly declare that its provisions embraced this case. What then, we may inquire, was the purpose of the present debt? Was it *profit* or *improvement*, within the meaning of the 9th section of the act of 1843? We answer this question in the negative, and think the following argument and illustration will demonstrate the correctness of our answer.

It is the settled doctrine of this country, that corporate powers are of three kinds: express, incidental, and implied powers. This doctrine is asserted in the following decisions of this court: City Council of Montgomery v. Montgomery & Wetumpka Plank-road Co., 31 Ala. 83; *Ex parte* Burnett, 30 Ala. 461; Intendant, &c. v. Pippin, 31 *ib.* 542, and authorities cited. See, also, Aug. & Ames on Corp. §§ 256–7; Grant on Corp. 13, in margin: Mayor &c. v. Winter, 29 Ala. 651. It is also well settled, that the right to aid in the construction of a railroad, plank-road, &c., lying without the limits of a municipal corporation, is not within the pale of either implied or incidental powers of such municipal corporation; but must be

expressly conferred, or it can not be exercised.—See Mayor &c. v. Winter, *supra*; City Council of Montgomery v. Plank-road, *supra*; Pierce on Railways, 108; Redf. on Railways, 533-4, and notes. Now, let us suppose that, in the grant of powers to the city government of Mobile, the legislature had empowered that body to *borrow money*, and to *create debts*, for *purposes of profit or improvement*; would such grant of power, without more, have authorized the city authorities to aid in the construction of the Great Northern railroad, by a loan to that company of a million of the city bonds? We apprehend no one would assert such a proposition. The *purposes of profit and improvement* would be understood as referring to those ordinary purposes of city policy, which are implied in the fact that the corporation is municipal, or which are expressed in the general grants of power to such corporations, to provide for the health, peace, good order, and general welfare of the inhabitants. Such grant of power would not be understood as conferring authority to aid in the construction of a railroad outside of the city.

Another view: The 9th section of the act of 1844 is a regulation of the power to borrow money, and to create new debts, for purposes of profit and improvement. This is a legislative recognition of an *existing* power in the city government; for the legislature would not perform the senseless ceremony of regulating the exercise of a power which had no existence. The city authorities, then, possessed *the power*, which the legislature attempted, in the 9th section of the act of 1843, to regulate. The power they were regulating was the power to borrow money, and to create new debts, for purposes of profit and improvement. Now, if the regulations prescribed in the 9th section of the act of 1843 be broad enough to cover the contract entered into between the city and the Great Northern railroad, it is difficult to resist the conclusion, that the city authorities would have been authorized to furnish aid to the railroad, without further statutory authority therefor. In other words, the phrase *for purposes of profit or improvement*, in an enabling clause, would certainly be as comprehensive as the same language would

be in the restraining or regulating clause. Yet all parties concede, that without the acts of 1858 and 1859, the city authorities would not have had the power to aid the railroad. The question, then, comes down to this: Power to "borrow money, and to create new debts, for purposes of profit or improvement", would not have authorized the city government to aid in the construction of the Great Northern railroad; the regulations prescribed by the 9th section of the act of 1843 are, in express terms, limited to acts of borrowing money, and creating new debts, for purposes of profit and improvement; therefore, the regulations provided by the said 9th section do not embrace the contract by which the city authorities bound themselves to furnish a million of bonds to the Great Northern railroad.

[7.] The 16th section of the act of 1843 does not govern this case. Its language is, "After the passage of this act, it shall not be lawful for the members of the boards of aldermen and common council to make any contract with the corporate authorities, to do any work, or perform any service for the same, nor shall any appropriation be valid that shall be made for this."—Pamph. Acts of 1842-3, p. 116. Under the present contract, no member of the board of aldermen or common council is *to do any work, or perform any service* for the city council.

[8.] The 7th section of the act of 1844 (Pamph. Acts of 1843-4, p. 178) requires the mayor, aldermen and common-councilmen of the city of Mobile, severally to take an oath, not to be, during their continuance in office, "directly, or indirectly engaged in any contract with the corporation, or sell to, or buy from it, any estate, interest, or matter whatsoever." An argument adverse to the validity of this contract is based on this section. We deem it unnecessary to inquire whether the present contract is covered by the official oath of the mayor, aldermen and common-councilmen. If it be thus covered, a disregard of this duty may expose the officers to the imputation of official error, or infidelity. But there is nothing in the section which declares such act void, or which imposes a penalty for its violation. In such case, if there

be nothing more in the transaction, the act will be valid in law.—*O'Connell v. Sweeney*, 5 Ala. 467; *Ivey v. Nicks*, 14 *ib.* 564; *Staples v. Smith*, 12 Wend. 57; *Foster v. Oxford &c. Railway Co.*, 14 Eng. Law & Eq. 306; *Lefeuivre v. Lankister*, 3 Ellis & Blackb. 530; *In re Leefe and Wife*, 2 Barb. Ch. 39.

[9.] The only remaining question which we propose to discuss, arises out of the fact that several members of the two boards—the aldermen and common council of the city of Mobile—were also, at the time of the contract, stockholders in the Great Northern Railroad; being, as it is alleged, both bargainors and bargainees. It is not pretended that any bad faith was practiced by the contracting parties; but the argument is, that this contract should be set aside on grounds of public policy. The rule governing contracts between trustees and beneficiaries is invoked.—See *Gilmer v. Calloway*, and *Payne v. Turner*, at the present term. The appellants also invoke the rule which prohibits a party from being a judge in his own cause.—See *Wilson v. Wilson*, at the present term; and *Dimes v. Grand Junction Canal*, 16 Law & Eq. 63, 73.

In the great case of *Ranger v. Great Western Railway Company*, before the British House of Lords, (27 Eng. Law & Eq. 35,) *Ranger*, the appellant, had become a very extensive railway contractor with the company. By the terms of the contract, many matters were made to depend on the decision of the engineer appointed by the company. Mr. Brunel was the engineer. The bill was filed by Mr. *Ranger*, alleging an improper discharge by Mr. Brunel of his powers as a judge or arbiter in the premises; by which, the complainant alleged, he had lost many thousand pounds sterling. He further alleged, that Mr. Brunel was a stockholder in the company, and was, therefore, not indifferent in the premises; and that he (the complainant) had not known this fact, until recently before the bill was exhibited. One question considered was, whether Mr. Brunel was incompetent, by reason of his interest, to adjudicate the matters which the contract referred to the decision of the company's engineer. Opin-

ions were delivered by Lord Chancellor Cranworth, and by Lord Brougham.

In delivering his opinion, Lord Cranworth said: "When it is stipulated that certain questions shall be decided by the engineer appointed by the company, that is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising during the progress of the works. The company reserved the decision for itself, acting, however, as from the nature of things it must act, by an agent; and that agent was, for this purpose, the engineer. His decisions were, in fact, their decisions. The contract did not hold out, or pretend to hold out, to the appellant that he was to look to the engineer in any other character than as the impersonation of the company. In fact, the contract treats his acts and their acts, for many purposes, as equivalent, or rather identical. I am, therefore, of opinion, that the principle on which the doctrine as to a judge rests, wholly fails in its application to this case. The company's engineer was not intended to be an impartial judge, but the organ of one of the contracting parties. The company stipulated, that their engineer for the time being, whosoever he might be, should be the person to decide disputes, pending the progress of the works; and the appellant, by assenting to that stipulation, put it out of his power to object, on the ground of what has been called the 'unindifferency' of the person by whose decision he agreed to be bound. It is to be observed, that the person to decide was not a particular individual, in whom, notwithstanding his relation to the company, the contractor might have so much confidence as to agree to be bound by his award; but any one whom, from time to time, the company might choose to select as their engineer. The appellant alleges, that he did not know the fact that Mr. Brunel was a share-holder, until more than two years after the works had been begun. But he must have known that the company had it in their power to appoint another engineer in Mr. Brunel's place, who might hold shares; or that Mr. Brunel himself might purchase shares."

Lord Brougham said: "He (Mr. Ranger) might have made an exception in his contract, that Mr. Brunel, the engineer, should not hold shares; but that provision was not made. Had this proviso been made, this absurdity would happen, to which my noble and learned friend has adverted, that although not possessed of shares at that time, he might any day have become possessed of shares—he might have purchased them; nay, more, he might have inherited them; they might have come to him by descent, and then he would have been put in this position—that he must either have given up what had come to him, or have ceased to be the engineer employed by the company; for, if he had continued possessed, either by purchase or inheritance, of a single share, according to the rigor of the argument deduced from *Dimes v. Gr. Juno. Canal Company*, he must have ceased to act under these covenants, and the whole operations of the company must at once have been convulsed."

In the case of *Haight and others v. Day*, (1 Johns. Ch. 18,) a charter had been granted for a bank, which appointed certain commissioners to receive subscriptions for stock; and empowered them, in case an excess of stock should be subscribed, to apportion the excess among the several subscribers, as they (the commissioners) should judge discreet and proper. A large excess was subscribed, and the commissioners proceeded to exercise their power of apportionment. A bill was filed to vacate the alleged apportionment, which charged, that the commissioners had arbitrarily assigned the shares among *themselves*, their *relations*, *favorites*, &c., and had excluded other equally meritorious subscribers. There was, also, a charge of bad faith; but this was denied by the answer. Chancellor Kent ruled, that "the word *apportion* must mean, here, to assign to each subscriber, or give him, such portion as the commissioners deem meet." The charge of corruption, and of wanton and unworthy exercise of discretion, being repelled by the answer, he dissolved the injunction.

A similar decision was made by Chancellor Walworth, in a most elaborate opinion, pronounced in the case of *Walker v. Devereaux*, 4 Paige, 229. See, also, *Com. v.*

Ryan, 5 Mass. 90; Cotton v. Evans, 1 Dev. & Bat. 284; Groton v. Hurlburt, 22 Conn. 178; Conn. &c. Railroad Co. v. Bailey, 24 Verm. 465; U. States v. Murphy, 16 Peters, 203; Crocker v. Crane, 21 Wend. 211; Heydenfeldt v. Townes, 27 Ala. 423.

We think, that the power conferred on the corporate authorities of the city of Mobile, to aid in the construction of the Mobile and Great Northern railroad, under such contract with said Mobile and Great Northern Railroad Company as said city authorities might agree upon, must be construed as conferring the authority to make the contract on whoever may be the mayor, aldermen and common council of said city, at the time the contract is entered into; and that, in the absence of actual bad faith, the fact that certain members of the boards of aldermen and common council are also stock-holders in the rail-road company, does not, *per se*, invalidate the contract.

The decree of the chancellor, dissolving the injunction, is affirmed.

JONES vs. FORT.

[ACTION TO RECOVER DAMAGES FOR LOSS OF SLAVE ACCIDENTALLY KILLED.]

1. *Whole conversation admissible, when part has been proved.*—When a part of a conversation has been proved by one party, the other has a right to call for all that was said at the time relating to the same subject-matter.
2. *Admissibility of evidence rebutting negligence.*—Under a count in trover, to recover damages for the loss of a slave, who was accidentally killed while employed in raising a gin-house for the defendant: the plaintiff having adduced evidence, tending to show that, on account of the weather and the condition of the timbers, it was imprudent to attempt the work on that day, it is competent for the defendant to prove, in rebuttal, that the work was undertaken after consultation among the persons present as to the propriety and safety of so doing.

3. *Abstract charge.*—A charge cannot be considered abstract, when there is any evidence, however weak, tending to support it.
4. *Charge objectionable for obscurity or generality.*—A charge which is not abstract, and which asserts a correct legal proposition, though it may be objectionable for generality and obscurity, or calculated to mislead the jury, is not an error which will work a reversal: the party who supposes himself injured by it, should ask an explanatory or qualifying charge.
5. *Charge invading province of jury.*—A charge which assumes a fact as proved, when the evidence only tends to establish it, is an invasion of the province of the jury.
6. *Rights and liabilities of hirer of slave.*—Under a general contract of hiring, the hirer has no right to employ the slave in assisting to raise a gin-house on his plantation, or to hire or loan him to another to be so employed, if that service involves greater danger than prudent masters are usually willing to have their slaves exposed to; yet, if the slave is hired for the specific purpose of being employed as a plantation hand, and it becomes necessary to erect a gin-house on the plantation during the term, and that service is commonly performed by plantation hands whenever it is needed, the hirer is authorized to employ him in that service, provided he exercises due care and prudence to prevent accident or injury; but he cannot, under such special contract, hire or loan the slave to another, for the specific purpose of being employed in raising a gin-house.
7. *Admissibility of evidence of custom.*—In an action by the owner, against the sub-bailee of the hirer, to recover damages for the loss of a slave, who was accidentally killed while assisting to raise a gin-house on the defendant's plantation, (the contract of hiring being general in its term,) although it may be competent for the defendant to prove that prudent masters generally are in the habit of employing their own slaves in that service when necessary, he cannot prove a local custom among planters to send their own and their hired slaves to assist their neighbors in raising gin-houses.
8. *When sub-bailee of hirer is liable in trover.*—If the hirer of a slave, under a contract either general or special, gratuitously lends him to another person, for the specific purpose of being employed in raising a gin-house, and the slave is killed while so employed, the sub-bailee is liable to the owner for his value, in trover, no matter what degree of care he exercised in having the work performed:

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Rachel M. Jones, against Elias W. Fort and Gabriel H. Fort, to recover damages for the loss of a slave, who was hired by the plaintiff to

one Squire Lowry, for the year 1858, was loaned by said Lowry, during the term, to the defendants, to be employed in assisting to raise a gin-house on their plantation, and was accidentally killed while so employed. The original complaint contained only a count in trover, in the form prescribed by the Code; but, by leave of the court, two additional counts were afterwards inserted in the complaint, as follows: "And plaintiff claims of defendants the further sum of \$3,000, as damages, for that the plaintiff, being the owner and proprietor of a certain other slave, named Orange, on, to-wit, the 1st January, 1858, hired said slave to one Squire Lowry, for the year 1858; and before said term of hiring had expired, to-wit, on the 24th December, 1858, the said defendants wrongfully, and without authority from any one authorized to allow the same, took said slave from and out of the possession of said Lowry, and put him to dangerous and hazardous work, to-wit, to aid and assist in raising and putting up the timbers and frame of a gin-house; and while said slave was so engaged, so wrongfully under the control of said defendants, in raising said gin-house, certain of the timbers fell on and struck said slave, who, in consequence thereof, then and there died; and plaintiff has wholly lost and been deprived of her reversionary interest in said slave; to her damage, \$3,000. And plaintiff claims of said defendants the further sum of \$3,300, as damages, for that said plaintiff, on the 1st January, 1858, was the owner and proprietor of a certain other slave, named Orange, and hired said slave to one Squire Lowry, for and during said year 1858; and during said year, and before said term of hiring expired, said slave was wrongfully and illegally taken in the possession and employment of said defendants, without any authority or permission from said Lowry, and, while so in the employment of said defendants, was used and employed in raising a gin-house, and was then and there killed, by certain of the timbers falling upon and striking him; to plaintiff's damage as above stated." The defendants demurred to the complaint as amended, and to each count thereof, for a misjoinder of counts, and because it was

not averred that the defendants had notice of the plaintiff's title to the slave when they took possession of him; but their demurrer was overruled. The record does not show what pleas were interposed.

The material facts of the case are these: Squire Lowry, who was the son-in-law of the plaintiff, hired from her the slave Orange, with two others, for the year 1858, and gave his note for the aggregate amount of their hires; "which note was general in its terms, not expressing the employment in which said slaves were to be engaged, or where their services were to be rendered." Said slave was employed by Lowry as a field hand on his plantation, which was about sixteen miles from Marion. On the morning of the 22d December, 1858, Lowry was on his plantation, and went from thence to Selma; leaving his overseer on the place, but understanding that the overseer intended to leave on the next morning, to be absent until the 24th. Lowry's two sons, both of whom were over twenty-one years of age, were also on the plantation at the time, having gone down there for the purpose of hunting; and after the overseer had left, on the morning of the 23d, they were the only white persons on the place. On the morning of the 24th December, before the overseer had returned, the defendants, who were planting together on a place about a half-mile from Lowry's, sent a negro boy over to his plantation, requesting the loan of four hands to assist in raising a gin-house; and one of Lowry's sons sent over four negroes, including the boy Orange, for that purpose. Lowry returned from Selma on that morning, and was on his plantation two or three hours; but, as he testified, he knew nothing about said slaves having been sent to the defendants' plantation, until about one o'clock, when he was informed of the fact by his son while he was awaiting the arrival of the cars at the station-house; and a messenger from the defendants came, a short time after, to inform his son that the boy Orange had been killed while assisting to raise the gin-house, one of the timbers having accidentally fallen upon him.

Lowry, who was introduced as a witness by the plain-

tiff, testified, that neither his overseer nor his sons had any authority to send the slaves to assist in putting up the defendants' gin-house; "on the contrary, that he had expressly ordered his overseer, prior to said 22d December, not to send any of the negroes under his control to aid in raising a gin-house or screw, unless said overseer himself accompanied them." His two sons, who were introduced as witnesses by the defendants, testified, that they had nothing to do with the management or control of their father's plantation or slaves; and the one by whom the slaves were sent to the defendants' plantation stated, "that he did so thinking he was doing a neighborly act," and that he did not know at the time that Orange did not belong to his father. Lowry's overseer, introduced by the defendants, stated that, on two former occasions during the year 1858, he had sent slaves from the plantation to assist neighboring planters in raising gin-houses. "On cross-examination by plaintiff, said witness was asked, if the defendants' overseer did not, on the 22d December, apply to him for help to raise a gin-house on the next day; and he answered, that he did, and that he (witness) did not send the negroes on account of the death of a negro on the place, who was to be buried on the next day. The defendants then asked said witness, what he said to defendants' overseer about sending help to raise said gin-house; and he answered, that he told said overseer he would send to help him on the next day if any of the negroes on the place did not want to go to the funeral. To this question and answer, each, the plaintiff objected, and reserved an exception to the overruling of her objections."

The plaintiff introduced evidence showing, "that the raising of gin-houses was not the common, ordinary service in which slaves were accustomed to be engaged, but was extraordinary, and out of their usual course of labor; that it was always a hazardous and dangerous business, and particularly so in wet weather; that a good deal of rain had fallen a day or two before the 24th December, and it rained there that morning; and that the ground and timbers were wet." The defendants offered evidence,

on the other hand, "tending to show that it was the settled custom in the country, in the neighborhood of Squire Lowry's plantation, to employ slaves in the raising of gin-houses and screws, and for one neighbor to send his slaves to assist another, without charge, whenever such work was to be done; that such services were thus rendered, whether the slaves belonged to the person sending them, or were only hired for a time; also, that the defendants' gin-house was raised in the usual way, under the superintendence of a competent and skillful workman, and that all proper care was taken to prevent accidents. In this connection, the court allowed the defendants to prove, against the plaintiff's objection, "that on the morning of the 24th December, before they commenced the work of raising said gin-house, they held a consultation with the other persons present, to determine whether it would be safe to go on with the work on that day, and that they decided it would be safe;" and to the admission of this evidence the plaintiff reserved an exception.

"The above being the substance of all the evidence in the cause, the plaintiff insisted before the court and jury, among other points, that the defendants had acquired the possession and control of the slave Orange without authority from any one authorized to give it, and, said slave having been killed while in their employment, that defendants were liable to plaintiff for his value at the expiration of the term of hiring; that said slave came to his death by the negligence and recklessness of defendants while in their possession; that the raising of gin-houses was extraordinary service, and not the usual employment of slaves; that said slave being killed while raising a gin-house in the defendants' employment, they were liable to plaintiff for his value; and that plaintiff was not chargeable with notice of the custom about sending slaves to assist in raising gin-houses, and was not bound thereby, inasmuch as it was shown that plaintiff resided near Marion, while said custom existed in the neighborhood of Lowry's plantation, sixteen miles distant from Marion."

The court charged the jury, in writing, as follows:

"1. If the evidence shows that the slave was in the defendants' possession by the authority of Lowry, the hirer, then their possession was not illegal.

"2. If the defendants' possession was lawful, then the plaintiff is not entitled to recover, unless she proves negligence on the part of the defendants.

"3. In determining whether Lowry authorized or consented to the defendants' possession, the jury may look to the fact, (if it be proved,) that he knew said slave was in their possession, and made no objection thereto.

"4. If the jury believe, from all the evidence in the case, that John Lowry had authority, express or implied from the conduct of his father, to send said slaves to defendants, and did so send them, then the plaintiff is not entitled to recover, unless the defendants are shown to have done some act wrongful in its nature, or to have omitted some duty in reference to said slave; and to show an implied authority from Squire Lowry to John Lowry, the jury may look to all the evidence in the cause, and to the conversation and conduct of Squire Lowry when informed that his son had sent the slave to assist the defendants; and if such authority arise by implication from the conduct of Squire Lowry, it is as good as if it were express.

"5. If the jury believe from the evidence that, in January, 1858, it was a custom of the country, in relation to slaves, that one planter would send his slaves, without compensation, to work for a neighbor in erecting gin-houses, then plaintiff is charged with notice of this custom, if she hired her slave to Squire Lowry in the country, and to be employed in the country where said slave was to be employed by said Lowry.

"6. If the jury believe from the evidence that the defendants' possession of the slave was acquired without any wrongful act on their part, or on the part of either of them, and without any assumption of ownership on their part; but that the slave was in their possession without any notice that the plaintiff had a claim to the slave, and was put into their possession by a person claiming to exercise ownership over said slave, and was accidentally killed while in their possession, without any

fault on the part of the defendants, or either of them, the jury should find for the defendants."

The plaintiff excepted to each of these charges, and then requested the court to instruct the jury—"1st, that if they believed the evidence, they must find for the plaintiff; and, 2d, that if they believed the evidence, they must find a verdict for the plaintiff against the defendant Elias Fort." The court refused each of these charges, and the plaintiff excepted to their refusal.

The rulings of the court on the evidence, the charges given by the court, and the refusal of the charges asked, are now assigned as error.

BROOKS & GARROTT, for appellant.

BYRD & MORGAN, *contra*.

R. W. WALKER, J.—1. The plaintiff having brought before the jury a part of the conversation between the overseer of the defendants and the overseer of Squire Lowry, in reference to the application which the former made for hands to assist in raising the gin-house, the defendants had the right to the whole conversation having relation to the same subject-matter.

2. The complaint contained a count in trover; and the bill of exceptions states, that the plaintiff insisted, before the court and jury, "that the slave came to his death by the negligence and recklessness of defendants while in their possession." There was some evidence offered, the obvious purpose of which was, to show that the gin-house was raised under circumstances which rendered it imprudent to attempt the work at that time. To repel the presumption of negligence and recklessness which such evidence had a tendency to create, the fact that the work was undertaken after consultation as to whether it was safe to proceed with it on that day, was admissible in behalf of the defendants.—*Ala. & Tenn. R. R. Co. v. Burke*, 27 Ala. 541.

3-4. A charge cannot be considered abstract, when there is any evidence, however weak, tending to support it.—*Hair v. Little*, 28 Ala. 236; *Partridge v. Forsyth*,

29 Ala. 200. We cannot say that there is *no* evidence, to which the first three charges are applicable; and, as they assert correct legal propositions, we cannot reverse on account of them, although it may be that they were objectionable for generality and obscurity, and calculated to mislead the jury. If the plaintiff desired any modification or qualification of the charges, she could have attained her object by a prayer for additional instructions from the court.—Reavis' Dig. 319, § 60; Skinner v. State, 30 Ala. 524.

5. As we understand the 4th charge, it assumes as a fact, that Squire Lowry was informed, before the slave Orange was killed, that his sons had sent the slave to assist the defendants. The utmost that can be said of the evidence is, that it has some tendency to establish this fact. The charge was, therefore, an invasion of the province of the jury.—McDougald v. Rutherford, 30 Ala. 253; Shepherd's Dig. 460.

6-8. It is a mistake to suppose that the bailee of a slave, under a contract of hiring which is general in its terms, without express restriction as to the nature or place of employment, has all the rights of a master during the period of bailment, and may use or employ him in any way, or at any place, where or in which the master could lawfully use or employ him. A master may, if he chooses, set his slave to blasting rock, immure him in an unhealthy mine, or put him before the mast on a distant voyage; but the hirer, under a general contract of hiring, has no right to do any of these things. Such a bailee is entitled to make such use, and bound to take such care of the slave, as prudent masters usually do of their own negroes. The legal effect of the contract is, that the hirer is authorized to employ the slave, or to bail him to another to be employed, in any business to which slaves are ordinarily put, and which is not attended with extraordinary peril to his life or health. This is but another mode of stating the proposition, that the contract limits the labor in which the slave may be employed to such service as prudent men would usually be willing to engage their own slaves in.—Seay v. Marks, 23 Ala. 532; Ala. & T.

Railroad Co. v. Burke, 27 *ib.* 540; Spencer v. Pilcher, 8 Leigh, 565, (582-3;); Mullen v. Easley, 8 Humph. 428; Jones v. Glass, 13 Iredell, 308; McLauchlin v. Lomas, 3 Strobh. 85; Latimer v. Alexander, 14 Geo. 260, (267;); 3 S. & M. 142; Swigert v. Graham, 7 B. Monroe, 661; Hawkins v. Pythian, 8 B. Monroe, 515.

But, where a slave is hired for a particular purpose, the owner agrees to take the risks incident to his employment in that service; and therefore, he may be set to it, and kept at it in the usual way, without regard to the degree of danger involved in such work.—Nesbitt v. Drew, 17 Ala. 379; Heathcock v. Pennington, 11 Ired. 640; Gorman v. Campbell, 14 Geo. 137; McLauchlin v. Lomas, 3 Strob. 85; Sims v. Chance, 7 Texas, 561; Williams v. Taylor, 4 Por. 234; Lansford v. Baynham, 10 Humph. 267. On the other hand, it is a breach of the contract, for the hirer to put the slave to any other service than that for which he is hired; and especially is this the case, where the service to which he is put involves more danger than the ordinary duties of the service for which he was hired. Authorities *supra*; Hooks v. Smith, 18 Ala. 338; Bedford v. Flowers, 11 Humph. 242; Angus v. Dickerson, 1 Meigs, 459; Duncan v. Railroad Co., 2 Rich. 613.

When, therefore, a slave is hired to be worked on a plantation, the hirer has the right to employ him in any part of the ordinary labor of the place. Whatever belongs to the customary routine of work on the particular plantation on which he is hired, may be justly supposed to have been in the contemplation of the master when he made the contract; and all such service, therefore, falls within the scope of the bailment. Moreover, we know that gin-houses, corn-cribs, barns, and negro-cabins, constitute a necessary part of every well-ordered plantation, though the work required in erecting and repairing them may only be performed at considerable intervals of time, and may, therefore, be considered an exceptional service, somewhat out of the usual routine of plantation labor. And our opinion is, that where a slave is hired for the specific purpose of being worked on a plantation, if the raising of a gin-house becomes a necessary or proper

part of the business of the plantation during the term of hiring, *and is such work as is commonly performed by ordinary plantation hands whenever it is needed*, the hirer would be authorized to employ the slave in it, provided due care and prudence are exercised to prevent accident or injury.

But it does not necessarily follow, that he would be authorized to loan or hire him to another, for the *special purpose* of assisting in such work. The hirer is authorized to engage the slave in such work, not because that is the special service for which he was engaged, but because, in the regular course of affairs on the plantation, it has happened to become an incident to, and a part of, the general business for which he was hired. But the loan of the slave to another, for the specific purpose of raising a gin-house on his plantation, would not be a bailment for the same general business for which the slave was hired, or for any of the ordinary services of that business; but for a single service, which forms only an exceptional and occasional branch of plantation work, and in which the slave can be properly employed only when it becomes fairly, and in the regular order of events, an incident to the general business of the plantation whose customary routine of labor he is hired to perform. In the one case, the service is performed because, in the regular course of events, it becomes an incident to the general business in which the slave is engaged; in the other, it is performed because the bailment is for that special employment, not for a general business in the regular course of which that particular service has become necessary. And if such service is in fact attended with more danger than the ordinary labor required of slaves on a plantation, our opinion is, that the hirer of a slave, to be employed as a hand on a plantation, would not be authorized to lend him to another for the *specific purpose* of assisting in raising a gin-house.—*McLauchlin v. Lomas*, 3 Strobh. 87, (90). Such a loan would as effectually change the nature of the service for which the slave was hired, as if the hirer should bail him to a mechanic, for

the purpose of being employed in the raising of gin-houses throughout the entire term of the hiring.

On the other hand, if a slave is held under a general contract of hiring, the hirer may make such use of him as prudent masters usually make of their own slaves; in other words, the only limit upon his authority is, that he must not employ him in any service which involves extraordinary peril to his life or health. The legal effect of such a contract is, to deny to the hirer the right, as between himself and his bailor, of lending or rehiring the slave for the specific purpose of being engaged in any service which involves more danger than prudent masters would usually be willing to have their own slaves exposed to; for that is the degree of danger meant by the expression "extraordinary peril." If the raising of a gin-house does in fact involve the degree of danger just defined, then the legal effect of the general contract of hiring is, to deny to the hirer the right of lending the slave for the specific purpose of assisting in such work. And no such right on the part of the hirer can be imported into the contract, by proof of a local custom among planters to send their slaves, as well those hired as their own, to assist their neighbors in raising gin-houses. "A particular usage may be given in evidence, to influence the construction of a contract, or to explain the sense in which words or terms are used; but, when the contract is established, and is not governed by the commercial law, it is not allowable to change its character, and attach to it conditions in opposition to the established rules of law." *Petty v. Gayle*, 25 Ala. 422. Custom cannot overturn the positive requirements of the law, or the express contract of the parties, or make the legal rights or liabilities arising out of a given state of facts other than they are by the common law.—*Barlow v. Lambert*, 28 Ala. 709; *West v. Ball*, 12 Ala. 340; *Cadwell v. Meek*, 17 Ill. 220; *Foley v. Mason*, 6 Maryland, 37; *Bedford v. Flowers*, 11 Humph. 242. When the question to be determined is, whether a slave has been put to work which involves more danger to life or health than is authorized by the general contract of bailment, the fact that the generality

of prudent masters are in the habit of engaging their own slaves in the same service, may be admissible evidence.—*Ala. & T. Railroad Co. v. Burke*, 27 Ala. 540; *Mosely v. Wilkinson*, 30 Ala. 681. This is very different from changing the legal effect of the contract by proof of a local custom.

From what has been said, these conclusions follow:—

(1.) If the raising of a gin-house involves more danger than the ordinary labor of a plantation; and a slave, hired specially for plantation service, is lent by the hirer, for the specific purpose of being engaged in such work, and is killed while so engaged, the hirer is liable to the owner, in trover, for his value, although the killing was the result of inevitable casualty.

(2.) If the slave is held under a general contract of hiring, and is lent by the hirer for the purpose of being engaged in work for the performance of which the generality of prudent masters would not be willing to lend their own slaves, and the slave is killed while engaged in such service, the hirer would be liable for his value to the owner. But, if the work does not involve extraordinary peril—in other words, if prudent masters would, as a general rule, be willing to lend their own slaves for such service—and due care is exercised by the person employing the slave; then, neither the hirer, nor the person to whom the slave is lent, would be liable for his loss.

(3.) If, without the authority of the hirer, (whether his contract be general or special,) the slave is employed by a third person in raising a gin-house, and is killed while so engaged, the person employing him is liable for his value to the owner, no matter what degree of care he exercised in having the work performed.—*Collier v. Lyon*, 18 Geo. 648; *Johnson v. Arabia*, 24 Missouri, 86.

Would the result be different, if the slave is actually sent by the hirer, or under his authority, to assist in work forbidden by the scope of his contract with the owner; and the person to whom the slave is so lent, and in whose service he is killed, has no notice of the fact that he is hired, and no reason to suppose that the party from whom he receives him is not the owner? The question is one

which we have felt some difficulty in deciding; but our opinion is, that in the case supposed, the person borrowing the slave, and in whose service he is killed, would be liable in trover to the owner.

The *jus disponendi*—the right of controlling and using property—belongs to the owner; and he who interferes with the property of another, and appropriates it to his own use, is, as a general rule, a wrong-doer, unless he can show that he had authority for such interference and use, either from the owner or the law. Lord Mansfield uttered a legal truism when he said, that “whoever does an act, by which another person receives an injury, is liable to an action for the injury sustained.”—*Whitfield v. Le Despencer*, Cowper, 765. Ordinarily, the liability of the party inflicting the injury, to make reparation to the person injured, does not at all depend upon the motive or intention with which the act was done.—*Perminster v. Kelly*, 18 Ala. 719; 1 Hilliard on Torts, 99, 100. As an authority from one who had not the right to confer it is void, it is no legal excuse, for an act which causes an injury to another, that the party committing it acted under the direction, or by the consent of a third person, who himself had no right to grant such authority or permission. Hence the well-settled rule, that if the principal is a wrong-doer, the agent, however innocent in intention, who participates in his acts, is also a wrong-doer. Story on Ag. §§ 311–12. It is difficult to perceive any ground, on which a permission from, or a contract with another, who had no right to give the one or make the other, can, as between the person injured and the actual perpetrator of the wrong, change the legal character of the wrongful act, or exempt the author of it from responsibility to the person whom he has injured. It must, therefore, be true, as a general proposition, that if an injurious act be done without sufficient authority, it is no answer to the claim of the owner for redress, that the immediate author of the mischief acted in good faith, by the direction or consent of one whom he supposed to be the owner.

These are elementary principles, and are well sustained

by the authorities. Thus, in one of the notes to his edition of Blackstone, Mr. Chitty says: "In every case, where a master has not power to do a thing, whoever does it by his command is a trespasser."—1 Chitty's Black., note, p. 432. In *Perminter v. Kelly*, (18 Ala. 716,) this court held; that an agent, *either with or without notice*, is liable in trover, for an act which, if done by his principal, would amount to the conversion of the property of another. To the same effect is *Lee v. Mathews*, 10 Ala. 682. In *Stephens v. Elwall*, (4 M. & S. 259,) a merchant's clerk was held liable, in trover, for goods which he received from a bankrupt and sent to his employer, although they were delivered to him for that purpose, and he did not know that neither the bankrupt nor the merchant had any right to them. Lord Ellenborough said: "The clerk acted under an *unavoidable ignorance*, and for his *master's benefit*, when he sent the goods to his master; but nevertheless, his acts may amount to a conversion; for a person is guilty of a conversion, who intermeddles with my property, and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case." So, if an auctioneer should be employed by a sheriff to sell at auction goods which he had unlawfully seized upon an execution—as if the goods did not belong to the execution debtor—the auctioneer who should sell would be liable to an action for the tortious conversion, equally with the sheriff.—Story on Ag. § 312; *Farebrother v. Ansley*, 1 Campb. R. 343; *Adamson v. Jarvis*, 4 Bing. R. 66. In *Newsum v. Newsum*, (1 Leigh, 94,) it was held, that if an administrator sell a chattel, whereof his intestate died possessed, but which in truth belonged of right to another, and apply the proceeds to payment of his intestate's debts, in due course of administration, without any notice of the right or claim of the true owner, he is personally liable to the true owner for the value, in *trover* brought by the owner against him. Where the widow of a testator, intending to obtain administration of her husband's estate, began to collect his

assets before she had obtained letters, and employed A. to collect the debts owing to the testator, which he accordingly did, and paid the same over to the widow, believing that she was the administratrix; and the widow subsequently died, without obtaining letters of administration,—*held*, that A. was liable to be sued as executor *de son tort*, for the moneys he had received.—*Sharland v. Mildon*, 5 Hare, 469. These authorities clearly show, that the doctrine, that the possession of an agent is the possession of the principal, has no application to the case of a wrong-doer.—*Id.* 474; *Stephens v. Elwall*, 4 M. & S. 259; *Snowdon v. Davis*, 1 Taunt. 359.

If a slave is sent by the hirer to assist a neighbor, in work forbidden by the hirer's contract with the owner, it cannot be pretended that the use which the neighbor makes of the slave has the sanction of any legal authority. The undertaking of the hirer is, that the slave shall not be employed, either by himself, or by any sub-bailee of his, otherwise than is allowed by the scope of his contract with the owner.—*Harris v. Maury*, 30 Ala. 681. The hirer has no right to sub-hire, except for purposes consistent with the bailment under which he holds the slave. In the very act of loaning the slave, for a specific purpose forbidden by the contract, the hirer becomes a wrong-doer; and the possession of the loanee is a possession obtained by wrong, and for an unlawful purpose. So far as the owner is concerned, every use of his property must be deemed unlawful, which has not the sanction of his express or implied consent. As we have already seen, the hirer is guilty of a conversion, in permitting the slave to be engaged in a service prohibited by the terms of the original bailment; and upon general legal principles, it seems impossible to escape the conclusion, that the person who actually applies the slave to such service is, as to the owner, equally a wrong-doer. Nor, in the eye of the law, is he less a wrong-doer, because he honestly supposed that the person from whom he obtained the slave was in fact the owner. The ground of liability, in all this class of cases, is injury to another's property, without legal authority for the act which occasioned it.

If the hirer, instead of loaning, had sold the slave, and received the purchase-money, and the slave had been killed while in the service of the purchaser, the right of the owner to recover his value, in trover, would be wholly unaffected by the fact, that the purchaser had bought in good faith, without any notice of the claim of the owner; and yet his claim for exemption from liability would be almost as strong as that of a loanee who, in ignorance of the true proprietorship, and supposing that he had the owner's consent, applies the property of another to a use which leads to its destruction.—See further, Story on Bailm. § 39 (a.); 3 Rob. Prac. 72-75; Poole v. Adkisson, 1 Dana, 112; Featherstonaugh v. Johnston, 8 Taunt. 237; Whitman v. Abernathy, 33 Ala. 154, 161; Agnew v. Johnston, 22 Penn. St. R. 471; James v. Le Roy, 6 Johns. 274.

There is a marked distinction, between the case we have supposed, and that which was presented in Nelson v. Iverson, 17 Ala. 217. That was an action of detinue; and in the course of the opinion the court said: "If the bailee have the temporary possession of the property, holding the same as the property of the bailor, and asserting no title in himself; and, in good faith, in fulfillment of the terms of the bailment, either as expressed by the parties, or implied by law, restores the property to the bailor, before he is notified that the true owner will look to him for it, no action will lie against him; for he has only done what was his duty." This case proceeds upon the principle, that the bailee cannot dispute the title of his bailor; and that as the bailee, in returning the property according to the terms of his contract, only did what he was legally compellable to do, he cannot be liable for the property to another. But one who borrows a slave, for a service in which he is killed, does not occupy the position of a party who has only done that which he was legally bound, and could have been legally compelled to do. In the one case, the return of the property is but the discharge of a legal duty; in the other, an injury to another has been inflicted, by an act purely optional with the author of the mischief. A man shall not be put to answer for that *to which the law obliges him*; but he is

responsible for his voluntary act, where it inflicts injury upon the property of another.

The rule laid down in *Nelson v. Iverson*, *supra*, when thoroughly analyzed, must, perhaps, be recognized as an exception to the general principles we have stated above. Whilst we are not disposed to disturb that rule, it must be confined to the cases specified in the opinion of the court—that is, to cases where the bailee, in good faith, in fulfillment of the terms of his contract, has restored the property to his bailor, before he is notified that the owner will look to him for it.

Judgment reversed, and cause remanded.

BELL vs. BELL'S ADM'R.

[DETINUE FOR SLAVES, BY WIFE'S AGAINST HUSBAND'S ADMINISTRATOR.]

1. *Husband's marital rights; how affected by adultery, abandonment of wife, and intention that she should hold property as her own.*—The husband's marital rights attach, as against the surviving wife, to slaves which are delivered to her during the coverture, as her distributive share of a decedent's estate, although the husband, at the time of such delivery, had abandoned the wife, and was living in adultery with another woman, and so continued to live up to the time of his death; and although he never had the actual possession of the slaves, nor claimed them, but intended that his wife should hold and enjoy them as her separate property.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by James Raiford, as the administrator of Mrs. Lucy Bell, deceased, against Wm. C. Bell, to recover certain slaves, which the defendant held and claimed as the administrator of George W. Bell, deceased, who was in his lifetime the husband of the plaintiff's intestate; and was commenced on the 10th

March, 1858. The bill of exceptions purports to set out all the evidence that was adduced on the trial, but, under the decision of this court, it is unnecessary to state the evidence in detail. The material facts are the following : In 1816, in this State, George W. Bell married Lucy Raiford, then the widow of John Raiford, deceased, and lived with her, in Clarke county, until 1819 or 1820, when he left her and his family, and went to Mobile, where he died, intestate, in 1845. In 1823, Mrs. Bell removed to Wilcox county, carrying with her her five children,—three of whom were the children of her first husband, and two the children of said Bell; and she continued to reside there until her death, in 1855, and supported and educated her children without any assistance from her said husband. In 1826, the administrator of said John Raiford's estate delivered to Mrs. Bell, as her distributive share of the estate, a negro woman named Linda, who, with her increase since that time, is the subject of controversy in this suit; and these slaves remained in the uninterrupted possession of Mrs. Bell, who claimed and exercised control over them as her own property, up to the time of her death. In ———, 185—, after the death of Mrs. Bell, the defendant took out letters of administration on the estate of George W. Bell, claimed the said negroes as belonging to his intestate's estate, took possession of them, and returned them in his inventory as belonging to the estate; and letters of administration on the estate of Mrs. Bell were afterwards issued to the plaintiff. The plaintiff adduced evidence conducing to show, that George W. Bell, after leaving his family as above stated, never corresponded with his wife by letter, nor rendered her any pecuniary assistance, and that he lived in adultery in Mobile with two other women successively. On the other hand, the defendant's evidence tended to show, that Bell wrote to his wife several times, requesting her to come to Mobile; and that Mrs. Bell was prevented from following him by the relatives of her first husband, John Raiford, who were unwilling that she should carry with her said Raiford's children.

The court charged the jury, in writing, as follows: "1. If the jury find from the evidence that George Bell, the husband, before, and at the time his wife (plaintiff's intestate) got the possession of the slave Linda, was living apart from his said wife, and with another woman as man and wife, or in adultery; and that he continued to live apart from her, in that state, until his death, for the space of fifteen years or more; and that she had the open possession and control of said slave Linda, and of the children of Linda now in controversy, born after the wife's possession, and also the possession of the children of said George Bell, born of her own body by said Bell; and that she had the exclusive maintenance and support of said children, without any assistance from her said husband, and continued to possess and control the slaves in controversy, as her own, for eight or more years afterwards, and until her death; and that said George Bell did not, at any time in his life, and during his wife's possession as above stated, have possession or control of said slaves or their labor, or claim the same as his; and if they believe that said Bell never did [claim] or intend to claim said property, but intended that his wife should hold and enjoy the same to her own use, and as her own separate property,—then the defendant cannot, as his administrator, hold the property for his estate in this action under his intestate's title."

This charge, to which the plaintiff excepted, together with other rulings of the court which require no particular notice, is now assigned as error.

L. S. LUDE, with whom were BYRD & MORGAN, for the appellant.—The rights of the parties in this case are to be determined by the common law, which considered the legal existence of the wife, during coverture, as entirely suspended, or incorporated and consolidated in that of her husband; in other words, it regarded a *feme covert* as having no legal identity, unless the matrimonial relation was annulled or suspended by some temporary disability cast on the husband.—1 Bla. Com. 442; 2 Kent's Com. 143; Broom's Com. 596; Walker v. Fenner, 28 Ala. 473.

So effectually does this rule operate, that the wife is disabled, during coverture, from either holding or recovering property without the intervention of trustees.—*Carne v. Brice*, 7 Mees. & W. 183; *Smith v. Sheriff of Middlesex*, 15 East, 609; *Barlow v. Bishop*, 1 East, 432; *Glover v. Proprietors of Drury Lane*, 2 Chitty, 117. It is a logical consequence of this principle, that marriage operates as an absolute gift to the husband of all personal property which is in the possession of the wife at the time of the marriage, or which comes into actual possession during the coverture.—*Co. Litt.* 300; *Bell on Property of H. and W.* vol. 1, p. 34. The husband acquires an immediate and absolute property therein, not only potentially, but in fact; not by any subsequent act of his, but *eo instanti* by operation of law; and it can never again revest in the wife, or her representatives.—*Co. Litt.* 351; 2 *Bla. Com.* 436; *Andrews & Bro. v. Jones*, 10 Ala. 422. As to the wife's choses in action, however, which are not capable of immediate tangible possession, marriage operates merely as a conditional gift; the condition being, that they shall be reduced to possession during coverture.—*Bell*, § 51; 1 *Bright*, 36; *Co. Litt.* 351; *Bibb v. McKinley*, 9 *Porter*, 644.

At the time of the marriage between George W. and Lucy Bell, the latter had an undivided interest as distributee in the estate of John Raiford, deceased. This interest was then a mere chose in action, (*Bibb v. McKinley*, 9 *Porter*, 636; *Mayfield v. Clifton*, 3 *Stewart*, 380; *Clancy on Married Women*, 109;) but, under the authorities cited in the foregoing paragraph, the delivery of the slave Linda to Mrs. Bell, on the distribution of the estate in 1826, and her subsequent possession, vested the absolute property, by operation of law, in her husband; and his marital rights were not prevented from attaching by any or all of the facts hypothetically stated in the charge of the court—that is, (1st,) his abandonment of his wife, and subsequent adultery; (2d,) the fact that he never claimed, or intended to claim the property, but intended that his wife should hold and enjoy it as her separate property; and (3d,) the fact that he did not have the actual

possession, or exercise control over the slaves or their labor.

1. At common law, if the husband was banished, or had abjured the realm, an exception was allowed to the general rule as to the disability of the wife to contract, acquire property separate from her husband, or otherwise act as a *feme sole*. Prior to 1800, the English cases were not very consistent on the doctrine.—See them reviewed in 2 Kent's Com. 154–60. In *Marshall v. Rutton*, (8 Term R. 545,) before the twelve judges of England, it was decided, that a man and his wife cannot, by any act or agreement between themselves, change their legal capacities; nor can a married woman be treated as a *feme sole*, while the marriage relation continues to subsist, and she and her husband are living under the same government.—See, also, *Marsh v. Hutchinson*, 2 Bos. & P. 226; *Wardell v. Gooch*, 7 East, 582; *Chambers v. Donaldson*, 9 East, 471; *Bogget v. Frier*, 11 East, 301; 2 Chitty, 117; 15 East, 607. The reason of the rule is obviously to be found in the husband's common-law liability for necessities furnished to the wife.—*Broom's Com.* 421; 1 Camp. 120; 3 B. & C. 635. The rule laid down in *Marshall v. Rutton*, *supra*, has been adopted in Alabama; and it has been held, that a married woman, whose husband has abjured the State, and who has since traded as a *feme sole*, and taken notes in her own name, may sue and recover on them.—*Roland v. Logan*, 18 Ala. 310; *Mead v. Hughes*, 15 Ala. 148; *James v. Stewart*, 9 Ala. 857; *Arthur & Corprew v. Broadnax*, 3 Ala. 557. But, under these decisions, to remove the disability of coverture from the wife, there must be an abandonment of her, and a removal from the State without an intention to return. *Krebs v. O'Grady*, 23 Ala. 731; *Parker v. Lambert*, 31 Ala. 91; also, *Wells v. Thompson*, 13 Ala. 803. These authorities show, that the husband's adultery and abandonment of his wife, unsanctioned by a divorce, and without an abjuration of the State, did not enable the wife to act as a *feme sole*, nor prevent the husband's marital rights from attaching to her property.

2. Although this court has gone to an extreme length,

in protecting the claims of widows against the legal representatives of their husbands; yet no case can be found which countenances the proposition, that the husband's simple intention that his wife should have property, prevented his marital rights from attaching to it. The charge of the court in this case, in effect, instructed the jury, that a separate estate in the wife could be created by her acts in claiming and using the property, and her husband's intention that she should so hold and claim it. The error of this proposition is shown by numerous decisions of this court, some of which are cited for the appellee.—*Gamble v. Gamble*, 11 Ala. 972; *Machem v. Machem*, 15 Ala. 376; *S. C.*, 28 Ala. 382; *Bradford v. Goldsborough*, 15 Ala. 316; *Williams v. Maull*, 20 Ala. 730; *Frierson v. Frierson*, 21 Ala. 555; *Irons v. Reynolds*, 28 Ala. 309; 31 Ala. 91.

3. The error of the third proposition involved in the charge, as above stated, is conclusively shown by the numerous cases in which constructive possession by the husband has been held sufficient in law to cause his marital rights to attach to the wife's property.—*Magee v. Toland*, 8 Porter, 37; *Pitts v. Curtis*, 4 Ala. 351; *Broom v. King*, 10 Ala. 821; *Machem v. Machem*, 15 Ala. 377; *McDaniel v. Whitman*, 16 Ala. 345; *Chambers v. Perry*, 17 Ala. 730; *Hopper v. McWhorter*, 18 Ala. 231; *Gibson v. Land*, 27 Ala. 126; *Walker v. Fenner*, 28 Ala. 373; 2 J. J. Mar. 82; 1 Missouri, 667; 2 C. M. & R. (Eng. Ex.) 699; 2 Story's Equity, § 1404; 10 Sim. 254; 7 M. & W. 183.

WATTS, JUDGE & JACKSON, *contra*.—1. At the time of Lucy Raiford's marriage with Bell, her interest in the estate of Raiford was not property in her possession, either actual or constructive, but was simply an equitable chose in action, the legal title to the slaves being in the estate of Raiford.—*Brasher v. Williams*, 10 Ala. 630; *Kelly v. Kelly*, 9 Ala. 906; *Miller v. Eatman*, 11 Ala. 609; *Johnson & Co. v. Spaight*, 14 Ala. 27; *Andrews & Bro. v. Jones*, 10 Ala. 400; *Schuyler v. Hoyle*, 5 Johns. Ch. 205; *Galligo v. Galligo*, 2 Brock. 285; *Bibb v. Mc-*

Kinley, 9 Porter, 636. Bell acquired, by virtue of the marriage, simply the right to reduce this equitable chose in action into his possession during coverture; and when he reduced it to his possession as husband, but not till then, his marital rights attached to it.—Claney on Husband and Wife, 4; Bibb v. McKinley, and other authorities above cited.

2. Did Bell ever reduce this property into his possession as husband? Not only did he never have the actual possession, but there is no evidence that he ever knew his wife had the possession. He never asserted any right to the property, and never did any act indicating an intention to claim or exercise dominion over it. There is no evidence that his wife acted as his agent in receiving the property, or that he ever ratified her act by word or deed. She always claimed the property as her own, and exercised dominion over it as her separate property; and if her husband ever knew anything about the property whilst it was in her possession, he acquiesced in her assertion of title. To constitute a reduction to possession by the husband, such as will defeat the wife's right of survivorship, there must be some act on his part to change the property in the chose in action: something must be done by him to divest his wife's right and perfect his own; there must be some act of dominion, in the character of husband, over the chose in action. In the language of Chancellor Kent, "The property must come under the actual control and possession of the husband, *quasi husband*, or the wife will take as survivor."—2 Kent's Com. 138; Roper on Husband and Wife, 132–33; Wildman v. Wildman, 9 Vesey, 174; Johnson & Co. v. Spaight, 14 Ala. 27; Whitworth v. Hart, 22 Ala. 358; McNeill v. Mason, 23 Ala. 291; Jennings v. Blocker, 25 Ala. 415; Machem v. Machem, 28 Ala. 374; Gillespie v. Burleson, 28 Ala. 551; Lockhart v. Cameron, 29 Ala. 375; Planters' Bank v. Davis, 31 Ala. 632. In Machem v. Machem, *supra*, the wife was in possession of property, and was living under the same roof with her husband; and yet, because he neither did nor said anything which amounted to the exercise of dominion over it as husband, his marital rights were held

not to have attached. In *Whitworth v. Hart*, also, the husband and wife lived under the same roof, and the property in controversy was in their actual possession; but, because no acts or declarations of the husband were shown, by which it clearly appeared that he asserted his dominion over it as husband, his marital rights were held not to have attached. It is admitted that, *after* the husband has reduced the property to his possession, something more than a mere unexecuted intention on his part is necessary to vest title in the wife; but the authorities above cited conclusively show that, under the facts of this case, the property never was reduced to possession by the husband.

3. The abandonment of the wife by the husband, under the circumstances disclosed by the record, would prevent her possession from being his possession, and thus show that his marital rights never attached to the slaves.—*Mead v. Hughes*, 15 Ala. 145; *Cecil & Juxon v. Juxon*, 1 Atk. 278; 17 Serg. & R. 132; 4 Johns. Ch. 317.

A. J. WALKER, C. J.—The title to the property in controversy, at a date anterior to the adoption of any of our statutes concerning the separate estates of married women, is the subject of inquiry. Those statutes are, therefore, excluded from view in the discussion of the questions of this case.

It is a general rule of law, that the wife's possession of chattels is the husband's possession, and that the husband's property in the wife's chattels springs into existence with the commencement of her possession during the coverture, as if the manucaption had been his instead of hers. Clancy, in his work on Husband and Wife, states, that, as a general rule, the wife cannot possess personal property; that, as far back as English jurisprudence could be traced, marriage conferred on the husband dominion over the possession of the wife; that, in the contemplation of law, the wife is scarcely considered to have a separate existence; that the unity of the persons of husband and wife is the source whence the wife's disability to possess personal property is derived, and that the

husband takes the wife's chattels, which come into the wife's possession in her own right, whether it be by gift, or bequest, or in any other way.—Clancy on Husband and Wife, 1-2-3. And it has been decided by this court, that because the legal existence of the wife is merged in that of her husband, a delivery to the wife is a delivery to the husband, and the possession of the wife is the possession of the husband.—*Machem v. Machem*, 15 Ala. 373; *McDaniel v. Whitman*, 16 Ala. 343; *Mason v. McNeill*, 23 Ala. 201, 214-217; *Walker v. Fenner*, 28 Ala. 367; *Magee v. Toland*, 8 Porter. 35-42. There are decisions, which distinguish the effect of the wife's constructive possession, as implied from the holding of another for her, as her guardian, bailee, and the like, in the cases where the wife survives, from its effect when the husband survives. But such distinction does not belong to cases where the wife had actual possession, and it has never been made in such cases. A consideration of the cases making that distinction would, therefore, be altogether out of place in this case.

The marriage-tie between George W. Bell and Lucy Bell was subsisting when the latter went into the actual possession of the slave Linda; and by virtue of that possession, upon the principle hereinabove stated, the husband became the owner of the slave, unless something in the relation and attitude of the husband and wife towards each other, or in the conduct of the husband, excepts the case from the operation of the general rule. The first charge given by the court below is predicated upon the supposition, that an exclusion of the marital rights results, and an exception to the general rule prevails, when the husband, long before the wife's possession, lived apart, and in complete estrangement from his wife and family, in an adulterous connection, and so continued to live until his death many years afterwards, and never had or obtained possession of the property, and intended never to claim it, but intended that his wife should hold and enjoy it as her separate estate. The conclusion expressed in the charge is put upon the finding of two distinct unions, which seem to derive no force from their union,

and presents these two points of investigation—what is the effect of the husband's separation from his wife, and his adultery? and what is the effect of his intentional leaving of the property to the exclusive enjoyment and control of his wife, separated from him, coupled with the intention that she should have a separate estate in it?

What would be the effect of the husband's separation from his wife and his adultery, if accompanied by a permanent abandonment of the State, is not the question to be decided. The abandonment of the State is not within the hypothesis of the charge, and, indeed, is not shown by the evidence. In the cases which concede to the wife, who has been deserted by her husband, the privileges of contracting and suing as a *feme sole*, the husband had either permanently abandoned the State, or had been banished, or had never resided in the State; and they are expressly put upon the ground of the husband's non-residence.—Arthur & Corprew v. Broadnax, 3 Ala. 557; James v. Stewart & Rainey, 9 *ib.* 855; Mead v. Hughes, 15 *ib.* 139; Krebs v. O'Grady, 23 *ib.* 726; Roland v. Logan, 18 *ib.* 307; Gregory v. Pierce, 4 Mete. 478; Abbot v. Bailey, 6 Pick. 89; Gregory v. Paul, 15 Mass. 31; Smith v. Silence, 4 Iowa, 321. The principle of these cases is, that to relieve the wife of the disabilities of coverture, and to free her from the operation of the common-law doctrine of the merger of her legal existence in that of her husband, which controls almost every question of marital right and obligation, there must be something deemed analogous to an abjuration of the realm. These cases give no sanction to the proposition, that desertion, cruelty, adultery, or any other like cause, can, of itself, deprive the husband of his rights, or reinvest the wife with the powers of a *feme sole*.

Our decisions have infringed, to some extent, the rigid rule of the common law, that to invest the wife with the capacity of a *feme sole*, there must be a banishment of the husband, or an abandonment of the country for life without the privilege of returning, or transportation for a certain number of years; but this court has evidenced no inclination to depart from the common-law rule farther

than is above indicated.—See the cases above cited; also Clancy on H. & W. book 1, ch. 4, p. 54; 2 Bright on H. & W. 69–70; Bell on H. & W. 34–35.

In Massachusetts it has been decided, that the wife was not reinvested with the privileges of a *feme sole*, when her husband lived apart from her, in another town, in adultery, and she carried on trade on her own account. Russell v. Brooks, 7 Pick. 65. In the case of Altemus, (1 Ash. 49,) it was held in Pennsylvania, that a husband was not deprived of the right of administration upon the estate of his deceased wife, on account of his cruel and barbarous treatment of her, and his abandonment of her many years before her death. In the case of Abbot v. Bayley, (6 Pick. 89,) where it was replied to the plea of coverture, that the husband had, about eighteen years before, driven the plaintiff from his house by cruel treatment, and had since lived in adultery in one State, while the wife maintained herself in another, it was said, that if the parties had lived in the same State, it was certain that the facts stated in the replication would not have avoided the plea of coverture.

It is now well settled, both in England and America, that where husband and wife live apart by agreement, the wife has no right to sue and be sued as a *feme sole*, and the husband's interest in her property is not affected. 2 Kent's Com. (m. pp.) 154 to 162; Ames v. Chew, 5 Metcalf, 320. In England, the doctrine is, that a divorce *a mensa et thoro* does not confer upon the wife a capacity to sue and be sued.—Lewis v. Lee, 3 B. & C. 291. And in Pennsylvania the same doctrine seems to have been held. Clark v. Clark, 6 Watts & Ser. 85. In Massachusetts, the capacity to sue and be sued is conceded to a woman divorced *a mensa et thoro*; but it is put expressly upon the ground, that the separation is sanctioned by the law. Dean v. Richmond, 5 Pick. 461. The doctrine of this Massachusetts decision has the approval of Chancellor Kent, who intimates, that it might with propriety be extended, so as to include the case of the wife of a husband imprisoned for crime.—2 Kent's Com. (m. p.) 158. In this State, it has been decided, that a divorce *a mensa et*

thero does not affect the husband's right as tenant by the curtesy; and that the separation of a husband from his wife does not take away the right of reducing her property to possession.—*Smoot & Nicholson v. Lecatt*, 1 St. 590; *Thrasher v. Ingram*, 32 Ala. 645. And it is held in England, that a husband, from whom there is a divorce *causa alicuius*, may release the wife's legacy.—*Stephens v. Totty*, 1 Cro. Eliz. 903; *Chamberlain v. Hewson*, 5 Mod. 70; *Gilchrist v. Brown*, 4 Term, 766; *Bishop on M. & D.* §§ 682, 683. In the same country it is decided, that the husband's abandonment of his wife, and living in adultery in the same city, is not a sufficient reason for the court's granting her leave to convey her property without his concurrence.—*Ex parte Parker*, 30 Eng. L. & Eq. 493. In *Hyde v. Price*, (3 Vesey, 437.) and the cases there cited and commented on, it is very conclusively shown, that the doctrine, that the husband's abandonment and adultery divests him of his interest in his wife's property, has no place in the English law.

In Kentucky, the court, in maintaining the strict rule of the common law, has regarded the wife as subject to all the disabilities of coverture, notwithstanding the husband lived apart from her in another State.—*Tuttle v. Maney*, 2 J. J. Mar. 82. See, also, *Fuller v. Bartlett*, 41 Maine, 241; *Harris v. Taylor*, 3 Sneed, 536.

In the State of Ohio, it has been held, that a wife, driven from home by the husband's cruelty, and living and maintaining herself separately from him, and having separate property decreed to her as alimony, may sue in respect to that property, at law, as a *feme sole*.—*Benadum v. Pratt*, 1 Ohio St. 403; *Wagg v. Gibbons*, 5 Ohio St. R. 580. This decision in Ohio involves a departure from the established law, and assumes the province of the legislature in giving a new characteristic to the matrimonial status; unless it can be maintained upon the ground, that the property to which the suit related was secured to her as alimony.—2 Comyn's D. 238, *Baron and Feme*, O.; 1 Salk, 115. In Illinois, it has been said, in the reasoning of the court, that, if a husband compels his wife to live separate from him permanently, without her fault, and

fails to make a suitable provision for her support, she may acquire property, control it and her person, contract, sue and be sued as a *feme sole*, during the continuance of such condition.—Love v. Moyneham, 16 Illinois, 277; also, Prescott v. Fisher, 22 Ill. 390.

There is a class of cases, of undisputed authority, which assert that a wife, who carries on trade upon her own account, with her husband's consent, will, in equity, hold her earnings as a separate estate.—Pinkston v. McLe-more, 31 Ala. 266; 2 Bright on H. and W., 299; 2 Roper on H. and W., 171, 172. So, also, it is a doctrine of equity, that if the husband desert the wife, her earnings during the desertion will be treated as her separate estate. 2 Roper on H. and W., 172, 173; 2 Bright on H. and W., 299, 300, §§ 17, 18, 19; Cecil v. Juxon, 1 Atk. 178. This last named doctrine rests upon the principle, that he who has abandoned his wife, and left her without a support, must be presumed to consent that she shall have the earnings of her industry, and not intend that she shall starve. Roper puts the doctrine upon that principle; and the two cases of Cecil v. Juxon, (*supra*,) and Lamphir v. Creed, (8 Vesey, 599,) are thus harmonized; for, in the former, there was the element of abandonment, from which the husband's consent to the wife's carrying on trade on her own account could be inferred; while in the latter, that element was wanting.—2 Roper on H. and W., 172, 173, 174. In Bell on Property of H. and W., 287, 288, the doctrine is referred to the same principle. The presumption from the husband's abandonment is, that he consents for his wife to have *the fruits of her industry*; not that she shall have property coming to her as a distributee. The principle upon which the doctrine rests, shows that it has no application in this case, and that it is altogether misapplied by the counsel who rest upon it a vindication of the charge of the court below.

The decision in Starrett v. Wynn, (17 S. & R. 130,) referred to by the counsel for the appellee, seems from the opinion to have been made in reference to the property acquired by the wife during the period of the husband's desertion; and as courts of law in Pennsylvania (there

being no chancery court) enforce equitable rights, the decision may be referred to the equitable doctrine, that an abandoned wife is entitled to her earnings. It is quoted as an authority to that effect by Chancellor Kent, (2 Kent's Com. 164,) and it is only when viewed in that light that it can be considered as an authority supported by any sound principle. We confess, however, that an examination of *Knapp v. Scholl*, (10 Penn. St. R. 193,) and *Bonslaugh v. Bonslaugh*, (17 S. & R. 361,) in connection with *Starrett v. Wynn*, (*supra*.) inclines us to think, that in Pennsylvania, the husband's abandonment of his wife is regarded as depriving him of his marital right in her property.

There is, also, a class of cases, in which a court of equity lays hold of the wife's equitable property coming within its reach, and out of it makes provision for her maintenance, where the husband has deserted or mistreated her. There seems to be no fixed rule as to the amount of provision to be made for the wife in such cases: but where the abandonment of the wife was total and permanent, the chancellor has gone to the extent of appropriating the wife's entire property coming within his power to her maintenance.—*Drammond v. McGee*, 4 Johns. Ch. R. 318; *Bell on Property of H. and W.*, 137, 138; 2 *Story's Eq. Ju.* § 1424; *Wildman v. Wildman*, 9 Vesey, 154; 2 Kent's Com. 140; *Kenny v. Udall*, 5 Johns. Ch. 464. But this class of cases can have no application, where the title of the husband has been perfected by the reduction of the property into the actual possession of the wife pending the coverture.

This extended collation of the authorities indicates the existence of some decisions, which would sustain the position, that the marital right of Bell never attached, in consequence of his desertion of his wife, and his adultery; but the great weight of authority in this country, and the rulings of all the courts in England, and the opinions of the text-writers, are the other way. And besides, such a doctrine is at variance with the common-law theory of the marriage relation. It would attach to a voluntary separation on the husband's part all the consequences of a

divorce *a vinculo*, so far as the wife's capacity to contract, to sue and be sued, and to acquire property, is concerned. It would deprive the husband of his interest, *jure mariti*, in his wife's property, while he remains liable for her maintenance. It would free the wife from all the disabilities of coverture, while all the legal remedies for enforcing against the husband his liabilities and responsibilities remained open. It would deprive the husband of all interest in the wife's property, but leave her right to dower and a distributive share in his estate unaffected. We cannot follow the authority in favor of that position, and must decide, that the desertion and infidelity of Bell did not prevent his marital right from attaching to the property in question.

We now come to the second point of inquiry growing out of the first charge given, which is as to the effect of the intentional leaving by the husband of the property to the exclusive control and enjoyment of the wife, separated from him, coupled with the intention that she should have a separate estate in it. In the outset of this opinion, we adduced the authorities which establish that the failure of the husband to take the control of the property, his wife being in possession, could not prevent the vesting of his right, because the possession of the wife is the possession of the husband. This leaves nothing to be considered in reference to this last point, save the effect of the husband's intention that his wife should have a separate estate. If the marital rights of the husband attached upon the reduction of the slave into the wife's possession, it remained the property of the husband, unless he subsequently gave it to the wife. It seems that such a gift was not made, and if it had been made, it could only be available in equity. The question is reduced to this, whether the husband's rights attached: and that depends upon the other question, whether the husband's intention that his right should not vest, and that his wife should have a separate estate, is sufficient to exclude the right *jure mariti*, and invest the wife with a separate estate. In the examination of this question, we need not look beyond the decisions of our predecessors in this court; for

there is, perhaps, no country where this subject has been more thoroughly examined.

The case of *Puryear v. Puryear*, (12 Ala. 13,) was an action by the husband's representative, to recover money, arising from the hire of a negro, which the wife had hired out, in her own name, with her husband's consent. A part of the money had been received by the husband, and paid over to her by him. The husband declared the slave to be hers, and recognized her right to lend out the money, and to receive payment of it. These positive acts of the husband were held sufficient to show a gift by the husband to the wife. The decision is not based upon a bare intention of the husband that the wife should have the property, but upon acts amounting to a gift. In the case of *Machem v. Machem*, as reported in 28 Ala. 374, the decision that the husband did not reduce the property to possession *as husband*, and that the wife took a separate estate, is placed upon the ground, that the delivery to the wife was qualified, as being made for her separately from her husband, by his positive direction or consent. The same position is taken in *Jennings v. Blocker*, (25 Ala. 415, where it is said, that the husband "may repudiate all claim as husband to property given to the wife, and elect to treat it as hers, and hold or control it as her trustee; and if this election is made before the right or title is vested in him, and the coverture is determined while it is so held, his marital rights cannot be asserted afterwards to it." In that case, the receipt of the property was accompanied by the consent of the husband that it should be the wife's, and should be held as hers. In *Gillespie v. Burleson*, (28 Ala. 551,) a similar question arose, and it was clearly signified, that the husband's consent, given at the time of the delivery of a slave to the wife, was necessary, to so qualify the delivery as to exclude his marital right. In *Lockhart v. Cameron*, (29 Ala. 355,) the principle was thus announced: "When the husband receives the property *as the separate property of the wife*," and holds it openly and avowedly in the same right during the continuance of the coverture, "his right to the property never does attach, because he never re-

duced it to possession as husband." The authorities thus collected suffice to show, that in all the cases where the husband has been excluded from the ownership of the wife's property during the coverture, it has been upon the ground of his positive assent to that exclusion, qualifying the delivery or reduction to possession. There is no case, in which the mere intent of the husband that the wife should have a separate estate in the property, has been held to take away his right as husband. The husband has a positive right to the chattels of the wife reduced to possession, and he is not divested of that right by a mere unexecuted intention so to divest himself. It is not enough that the husband intends not to claim his right. He must actually and positively assent to his exclusion. We understand the first charge to assert the contrary doctrine, and we must declare it to be erroneous in doing so.

The delivery of the slave Linda to Mrs. Bell, as her distributive share in her husband's estate, by the administrator of that estate, vested such legal title as belonged to the estate; and it was competent to prove the contents of the burnt record.

We do not deem it necessary to notice the other questions presented.

Judgment reversed, and cause remanded.

BOBÉ'S HEIRS vs. STICKNEY.

[CASE IN EQUITY FOR SPECIFIC PERFORMANCE OF CONTRACT OF SALE.]

1. *What is reversible.*—On appeal by the complainants from a final decree in chancery in their favor, assigning as error the rules adopted by the chancellor for the statement of the accounts between the parties, the appellate court will not, at the instance of the appellees, consider the equity of the bill.
2. *When objection to master's report is necessary.*—Where the chancellor, in following a reference to the master, prescribes the rules to be

observed in the statement of the account, and the master conforms to those rules, an exception to his report is not necessary to enable the appellate court to examine into the correctness of the account thus stated.

3. *Construction and weight of answer.*—A statement in an answer, to the effect that "respondent does not admit the statement of moneys paid as charged in the bill to be correct, but avers that the aggregate of said payments but little (if any) exceeded the amount of principal and interest due on the first of said notes," does not so negative the payments claimed in the bill as to require the testimony of two witnesses, or of one witness with corroborating circumstances, to overturn it.
4. *Proof for introduction of secondary evidence.*—Secondary evidence of the contents of a vendor's title-bond, and of his several receipts for partial payments made by the purchaser, is admissible, on proof that said papers were last seen, after the purchaser's application for the benefit of the bankrupt act of 1841, on file with his other papers in the office of the assignee in bankruptcy; that said assignee afterwards absconded, and was removed from office, having never turned over to his successor the books and papers belonging to his office; and that the succeeding assignee, after diligent search in his office, could not find them, and could obtain no information concerning them from his predecessor, to whom he made several applications by letter.
5. *Conclusiveness of judgment.*—A judgment at law on a promissory note, given for the purchase-money of land, is conclusive between the parties as to the amount then due on the note; and the defendant, when subsequently seeking a specific performance of the contract in equity, cannot claim the benefit of payments which ought to have been credited on the note.
6. *Application of payments.*—If a debtor, owing several demands to the same creditor, makes a general payment, without giving any directions as to its appropriation, the creditor may, at his election, apply it to any one of the debts then due, but cannot prefer a debt not due, to the exclusion of one due or past due; and if he fails to make any election, the law will make the application according to fixed rules, preferring a debt due or past due to one not due.
7. *Note.*—Where a debtor owes two notes, maturing at different times, and the creditor has brought suit on the first; and, on the day the second note matures, the debtor makes a general payment, without giving any directions as to the manner of its appropriation,—the fact that the creditor afterwards takes judgment on the first note, for the full amount due thereon with interest, shows an election on his part to apply the payment to the second note.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. WADE KEYES.

THE original bill in this case was filed, on the 23d November, 1848, by the heirs-at-law of Thomas Bobe, deceased, infants suing by their next friend, against Henry Stickney, and the personal representative of said Thomas Bobe; and sought the specific performance of a contract, by which said Stickney, on the 26th November, 1836, sold to the said Bobe a lot in the city of Mobile. By the terms of the contract, as alleged in the bill and admitted in the answer, Bobe executed his three promissory notes for the purchase-money, due one, two, and three years after date, for \$602 50, \$855, and \$907 70, respectively; and Stickney executed and delivered to him a bond, conditioned to make "a fee-simple warranty title" to the lot on the punctual payment of the notes at maturity, together with the taxes and other demands. The title-bond, a copy of which was made an exhibit to the original bill, stated that Bobe, by the terms of the contract, agreed to erect "a good house or shop" on the lot; and it was admitted that he did erect improvements, the value of which was controverted. Bobe went into possession of the lot under his purchase, and continued in possession until some time in 1842, when, as the bill alleged, "said Stickney got the possession by inducing the tenant of said Bobe to attorn to him"; but the answer alleged, that Stickney took possession under a purchase at the tax-collector's sale, Bobe having failed to pay the taxes as he agreed to do.

The bill alleged, that the following payments were made by Bobe on the notes given for the purchase-money: June 14, 1837, \$525 50; December 13, 1837, \$200; April 16, 1839, \$5; June 22, 1839, \$200; Nov. 1, 1839, \$50; Nov. 26, 1839, \$100; March 17, 1840, \$200; May 7, 1840, \$150; August 11, 1840, \$100; March 15, 1841, \$100; and that some of these payments were endorsed on the notes, while separate receipts were taken for the others. In reference to these payments, the answer contained the following statement: "Respondent admits, that said Bobe, during his life-time, made payments of money to him, at various times, on account of the purchase-money, the consideration for said land; the times of which pay-

ments, and the amounts, this defendant cannot specify, having kept no copies of the receipts, or memorandum of payments; but he does not admit the statement of moneys paid as charged in the bill to be correct, but avers that the aggregate of said payments but little (if at all) exceeded the amount of principal and interest due on the first of said notes, and the additional one hundred and thirty dollars, which was to be a cash payment." Stickney brought suit on the second note, in December, 1838, and, on the 6th March, 1840, recovered a judgment thereon for \$1,014 60, besides costs; on which judgment an execution was issued, which was returned stayed by order of the plaintiff. The bill alleged, that Stickney had received from the rents of the land more than sufficient to pay the residue of the purchase-money, after deducting the payments made by Bobe; but the defendant denied this averment, and declared that, "if the said complainants shall pay him the original purchase-money, with interest, costs and expenses, and the court shall so decree, he is ready at any moment to execute to them a fee-simple title to said land." In his answer, however, to the second amended bill, occurs this statement: "Respondent adopts, as part of this his answer, all his former answers, except so much as offers to reconvey the land in the said bill described on payment by plaintiffs of the original purchase-money, interest, and costs."

Bobe died in May, or June, 1843, having been declared a bankrupt, under the act of congress of 1841, on the 3d May, 1842. The discharge in bankruptcy was set up by the defendant, in his answer to the original bill, by way of plea to the relief sought. The complainants afterwards filed an amended bill, in which they alleged said Bobe's application for the benefit of the bankrupt law, and his discharge under the decree of the court; that he surrendered to the assignee in bankruptcy all his rights of property, &c.; that his rights under the said contract with Stickney were never sold or otherwise disposed of by the assignee; and that Bobe's creditors, after his death, released to the complainants all their demands against his estate. In his answer to the amended bill, the re-

spondent admitted, that he had never been sued on his title-bond by any person claiming under the assignee in bankruptcy; but he required proof of the fact that the evidences of said Bobe's interest under the contract had been delivered to the assignee in bankruptcy, and of the execution of the creditors' release to the complainants.

A. Lavisson and J. H. Smoot were the chief witnesses examined by the complainants. Lavisson testified, that having been employed by Bobe's widow, soon after her husband's death, to bring suit against Stiekney for the lot in controversy, he went to the office of P. T. Harris, then assignee in bankruptcy, for the purpose of examining Bobe's papers relating to the matter; that Joseph H. Young, the partner and agent of said Harris, took out a bundle of papers from an iron chest in his office, opened it, and handed to him a title-bond and several receipts, which purported to be in the handwriting of said Stiekney, and a promissory note signed by Bobe, corresponding with the second one of the notes above described; that he took copies of these documents, which were attached to his deposition; and that said Young has since died. The receipts referred to by this witness, and the matters of account connected therewith, are particularly described in the opinion of the court, and, therefore, require no further notice here. Smoot testified, that in 1848, after said Harris had left the State, and had been removed by the court from his said office, he was appointed assignee in bankruptcy for the southern district of Alabama; that he immediately made diligent inquiry for all books and papers belonging to the office, but was not able to procure them: that he wrote several times to Harris, asking information about said books and papers, and particularly about Bobe's papers above described, but received no reply from him; and that he never qualified as assignee in bankruptcy under his appointment, because he could not get the books and papers belonging to the office.

The cause was heard, on pleadings and proof, in April, 1852, before Chancellor Lesesne, who ordered a reference of the matters of account to the master; and at the April

term, 1853, the master reported a balance of \$242 against the defendant; but the report does not appear to have been acted on by the chancellor. At the January term, 1855, Chancellor Keyes ordered a re-statement of the accounts, and directed the master to take the judgment on the second note as conclusive of the amount then due from Bobe to Stickney. Under this reference, the master reported, at the January term, 1856, that Stickney was indebted to the complainants in the sum of \$996. The complainants excepted to this report, because the master had omitted to charge Stickney with \$50, alleged to have been paid on the 1st November, 1839; and the defendant excepted to each credit allowed on the second and third notes, on account of the insufficiency of the evidence by which they were established. At the April term, 1856, the chancellor overruled the complainants' exception, and sustained the defendant's exceptions; and ordered a re-reference to the master, with the following directions: "In stating the account, the master will credit the complainants with the first note of \$812 50, mentioned in the bill as having been paid by Bobe in his lifetime, and \$150 for the additional land mentioned in the pleadings and proof; and will credit the defendant with the amount of the judgment on the second note, and interest, and with the amount of the third note and interest, without reference to the payments set up in the bill, which, in the opinion of the court, are not sufficiently proved. He will also credit the defendant with the payment of all taxes and expenditures for valuable improvements, and charge him with all rents received, or such as he might with reasonable diligence have collected." Under this order of reference, the master reported, at the same term, a balance of \$2640 due to the defendant; and the report was confirmed by the chancellor, without exception or objection by either party. The chancellor then rendered a final decree, directing the defendant to convey the lot to the complainants, on payment by them, within ninety days, of the amount reported to be due him, and ordering the bill to be dismissed if payment was not made within ninety days.

The final decree, and the last two orders of reference, are now assigned as error by the complainant.

K. B. SEWALL, for appellants.—1. The case made by the bill entitles the complainants to relief. Time is not of the essence of the contract.—*Davis v. Hone*, 2 Sch. & Lef. 347; *Lennon v. Napper*, *ib.* 684; *Pincke v. Curteis*, 4 Bro. C. C. 329; *Seaton v. Slade*, 7 Vesey, 265; *Hearne v. Tennant*, 13 *ib.* 287; *Hale v. Smith*, 14 *ib.* 433; *Parker v. Thorold*, 13 Eng. L. & Eq. 418; *Taylor v. Longworth*, 14 Peters, 172; *Edgerton v. Peckham*, 11 Paige, 352. Moreover, the defendant waived a punctual compliance, by acquiescing in the delay, receiving payments from time to time without objection, and reducing one of the notes to judgment.—3 Madd. 446; 19 Ves. 220; 3 Mer. 74; 4 Hare, 432; 4 Munf. 332; 2 Barb. (S. C.) 37; 7 Ohio, 97; 11 *ib.* 124; 8 Paige, 423; 10 Ala. 790; 2 Y. & Coll. 54 *a*, 66.

2. The delay is satisfactorily accounted for, by the death and bankruptcy of Bobe, and the infancy and condition of his heirs.—*New Barbadoes Toll Company v. Vreeland*, 3 Green's Ch. 160.

3. The bankruptcy of Bobe is no bar to the suit. The failure of the assignee in bankruptcy to dispose of the claim by sale, or to attempt to enforce it by suit, was an abandonment of his right to enforce the contract.—3 Sandf. Ch. 333; 6 Law Rep. 313.

4. In his answer to the original bill, the defendant submitted to a decree on the payment of the balance due him, and that submission could not be afterwards withdrawn.

5. The proof of the receipts signed by Stickney was ample, and a sufficient predicate was laid for the introduction of secondary evidence. The assignee in bankruptcy was the proper custodian of the original receipts, and they were last seen among the papers on file in his office; diligent search and inquiry for them was proved to have been made by the succeeding assignee. The copies were made by Lavisson from the originals, which he testifies were in the handwriting of Stickney; and his testimony, which is sufficient, of itself, to outweigh the

evasive statement of the answer, is corroborated by the defendant's admissions.

6. The judgment is not conclusive against the allowance of the payments evidenced by these receipts; because they were all made subsequent to the appearance term, and could only have been given in evidence under a plea *puis darrein continuance*, while the judgment was by default.—Franklin v. McGuire, 10 Ala. 560. Moreover, the judgment concerns only a part of the purchase-money, while this suit seeks an account of the whole; and equity will not permit the defendant to shield himself behind the judgment from liability for payments actually received.—Dart on Vendors, 534; Coote on Mortgages, 604; 2 Hilliard on Mortgages, 113. The mistake of the clerk, in the calculation of interest on the note, is patent on the face of the judgment, and ought to be corrected.—20 Ala. 304; 19 Johns. 246.

P. HAMILTON, *contra*.—1. The testimony of Lavisson is the only evidence on which the complainants rely to show error in the account as stated under the directions of the chancellor; and that, it is submitted, is wholly insufficient. He is a willing witness, and represents himself as a lawyer, employed to bring this suit; and his deposition is in his own handwriting. He does not prove payments within his knowledge, nor the handwriting of the receipts which he says he saw. The original receipts are not produced, nor is their loss sufficiently established.

2. The judgment is conclusive as to all payments alleged to have been made prior to its rendition.—Foster v. Wood, 6 John. Ch. 90; Simpson v. Hart, 1 *ib.* 98; Smith v. Lowry, *ib.* 321; 2 Ala. 388.

3. The complainants filed no exceptions to the report made by the master under the last order of reference; and they cannot now be heard to raise objections to the account as stated by him.

4. If the chancellor erred in the matters of account, the complainants have not been thereby injured, since they were not entitled to relief. Bills for specific performance are always addressed to the discretion of the

court.—6 John. Ch. 222. Here, the bill was filed twelve years after the contract was made, three years after the statute of limitations had barred a recovery on the notes, and five years after the defendant had taken possession under his purchase at the tax-collector's sale; and nearly every term of the contract appears to have been broken by the complainants' ancestor. Under such circumstances, they have no claim to the favorable interposition of the court.—4 Porter, 307, 313, 384; 16 Ala. 451; 1 John. Ch. 370; 4 Sm. & Mar. 694; 2 Story's Equity, § 771. Moreover, the bankruptcy of the complainants' ancestor is a bar to the relief sought by them, (11 Ala. 1002; 12 *ib.* 666; 3 McLean, 235; 2 Story, 360; 7 Blackf. 361; 5 Watts & S. 9;) and the fact that they are infants, against whom there is no mutuality of remedy, is a sufficient reason for dismissing their bill.—1 Madd. 12; 1 Sch. & Lef. 13, 20; 4 Russell, 298; Story's Eq. Pl. § 394; 1 Dan.Ch. Pl. 87, 88.

STONE, J.—The bill in this case was filed by the heirs-at-law of a purchaser, against a vendor, to obtain specific performance of a contract of sale of real estate to their ancestor. The chancellor granted relief, but imposed on the complainants, as a condition precedent, the payment of a certain sum, alleged to be the unpaid balance of the purchase-money. From that decree the complainants have appealed, and assign as error that the chancellor erred to their prejudice in laying down rules for the guidance of the register in taking the account. The assignments of error, in their direct effect, can not and do not raise any point on the equity of complainants' bill, or the right of complainants to maintain this suit. It is contended, however, for appellee, that there is no equity in the bill of complainants; and consequently, that the decree of the chancellor should not be reversed, even if we should find that in the matter of the account the court had fallen into an error.

This is not the first time we have had occasion to consider this question, although we have not, in terms, expressed our opinion upon it. We will now proceed briefly

to do so, and to give a few of the reasons which induce us not to adopt the practice indicated.

There is, in this case, no assignment of error, under which we could, with any propriety, dismiss the complainants' bill. The complainants assign the errors, and, of course, do not aver that they have no right to relief. The most that we could do—and, as we understand it, the appellee asks us to do no more—would be to affirm that the complainants had obtained greater relief than they were entitled to, and, on that account, refuse to reverse the chancellor's decree. Refusing to reverse, the result would be an affirmance of the decree below. This, in many cases, would operate a very great oppression. It would cut off all right of amendment, in cases in which, possibly, the very defect, on account of which we should refuse to reverse, might be remedied in the court below.

If the chancellor had decreed absolutely against the complainants below, and the case had come here by appeal, we would, in most cases, feel it our duty to inquire if the bill contain equity; and finding that it does not, to affirm the chancellor's decree, although he may have rested his judgment on a different and insufficient reason. That would have presented the familiar principle of a right judgment for a wrong reason.

Without intending, in this case, to intimate any opinion on the sufficiency of the bill of complainants, we feel it our duty, in the condition in which this case comes before us, not to inquire into that question. The equity of the bill not being raised by any of the assignments of error, that question must remain *res integra* in this court.

[2.] The question of the account is alone presented by the assignments of error. It is objected for appellee, that this question can not be considered, because there were no exceptions filed to the report of the register. The decretal order of reference defined with precision the rules by which the register was to be governed in taking the account. One of those rules was, to reject, as not proved, all payments claimed on the second and third notes. The argument chiefly pressed in this court for complainants is, that large payments should have been allowed on the

second and third notes. It was not necessary to except to that part of the proceedings before the register, because that officer conformed to the directions contained in the decree of the chancellor. The error, if any, is patent on the fact of the decree, without resort to the report of the register. In such cases, exceptions to the report would be supererogatory.

It is further urged for appellee, that the testimony in this case is insufficient to establish the payments claimed; and that, on this account, the decree of the chancellor should be affirmed. This seems to be the ground on which the chancellor based his opinion. The proof of payments, beyond those allowed, rests mainly on the testimony of the witness Lavisson. The argument is, that the testimony of this witness is suspicious, and is insufficient to overturn the denials in the answer. We hold, that this evidence is credible, and that it does sufficiently prove the payments claimed, for the following reasons.

[3.] The answer itself is not entirely above criticism, and does not, when fairly construed, negative the payments claimed, in such manner as to require two witnesses, or one with corroboration to overturn it. Its language is: "This respondent admits that, during his life-time, the said Bobe made payments of money to him at various times, on account of the purchase-money, the consideration for said land; the terms of which payments, and the amounts, this defendant cannot specify, having kept no copies of the receipts, or memorandum of payments; but he does not admit the statement of moneys paid as charged in the bill to be correct, but avers that the aggregate of said payments but little (if at all) exceeded the amount of principal and interest due on the first of said notes, and the additional one hundred and thirty dollars, which was to be a cash payment." It will be observed, that this language does not deny that the payments exceeded the first note and the additional \$130. The averment is, that the excess of those payments was little, if there was in fact any excess. What meaning the defendant attached to the expression "but little", we have no means of ascertaining. Under the strictest rule, the an-

swer can not be regarded as a denial that the payments had exceeded the amount of the first note and interest, and the amount of the after purchase, \$130.

It will be further observed, that the defendant states in his answer that he "kept no copies of receipts, or memorandum of payments." On page 42 of the record, in the proceedings before the register, are found what are styled, "*Entries from Stickney's book.*" In that book, as appears from the *entries*, Bobe was debited with the amount of the first note, with the additional purchase of two feet front, \$332 50. Immediately under this he is credited with "cash, as per receipt given to you," of date 1837, the several sums of \$300, \$100, \$100, \$5 50; "allowed you on above, interest, \$20;" then added, "by cash, as per my receipt, \$200"; footed up, \$725 50; subtracted, leaving \$207 balance; and under this, in pencil, "settled above note." It will thus be seen, that Mr. Stickney had kept a *memorandum* of some of the *payments*.

[4.] It is objected to the evidence of Lavisson, that no sufficient predicate had been laid of the loss of the original bond and receipts, to let in the secondary evidence of their contents. We think the evidence of Lavisson and Mr. Smoot is full to this point.

We are asked to disregard the evidence of Lavisson. We find nothing in the body of the deposition to cause us to distrust it. On the contrary, it is strongly fortified by the following facts: *First*, The answer of Stickney admits, that the paper which he, Lavisson, produces as a copy of the title-bond, is a substantial copy, both in the body of it, and as to the note written thereon, evidencing the subsequent sale of two additional feet front. *Second*, The copy-bond produced by Lavisson describes these notes, corresponding precisely with the notes admitted by Stickney, and produced, in part, by him on the reference. *Third*, One of the papers, a copy of which is furnished by Lavisson, as taken by him from the original in the custody of the assignee in bankruptcy, is in the following form: "Mr. Thos. Bobe has paid, including interest on the same, for account of his first note, five hundred and twenty-five dollars and fifty cents, the same being

endorsed on the back of said note, 14th June, 1837, (signed) Henry Stickney." Recurring again to the "entries from Stickney's book", copied in the record, we find the following :

1837.	Cr.
By cash, per receipt given to you	\$300 00
" " " " " " " "	100 00
" " " " " " " "	100 00
" " " " " " " "	5 50
" " allowed you on above, interest	20 00

Add those sums together, and they produce \$525 50, the amount of the receipt copied above. Immediately below the sums stated above, also of date in 1837, is another credit of \$200, "as per my receipt." Looking into the deposition of Mr. Lavisson, we find but one other copy receipt bearing date in 1837, which is for \$200, dated December, 13th. These corroborations, in our judgment, fully support the testimony of the witness Lavisson; and we feel no hesitation in holding the facts he testifies to to be fully proved.

[5.] The state of the proof in this case renders it necessary that we should lay down certain rules for the application of the payments made by Mr. Bobe. The first note was clearly paid in full, and we need give it no consideration, as none of the payments hereafter considered were or should have been applied to that note. It had been, before that time, fully paid. The second note matured Nov. 26, 1838; was put in suit, and reduced to judgment, March 6th, 1840, for full amount and interest. This judgment is conclusive evidence between the parties, that the amount for which it was rendered was then and there due and owing from Bobe to Stickney. The third note matured Nov. 26th, 1839, and was never sued on. Certain payments were made by Bobe, between the time when the second note matured, and the time when that note was reduced to judgment. These payments are: April 16, 1839, \$500; June 22, 1839, \$200; Nov. 1, 1839, \$50; Nov. 26, 1839, \$100. Of these sums, the payment of June 22, 1839—\$200—was applied to the second note, as is shown by the face of the receipt. This payment,

then, was lost to Mr. Bobe, by his failing to make defense when sued on that note.—*Mervine v. Parker*, 18 Ala. 241; *Shep. Digest*, 666, §§42, 46, 51, 54.

[6.] The following are rules for the application of payments, when the same debtor owes the same creditor more debts than one: 1st, the debtor, making payment, has the paramount right to direct and determine on which debt the payment shall be applied; 2d, the debtor failing to give direction, the creditor may then elect on which debt, then due in the same right, the payment shall be applied; but he cannot prefer a debt not due, to the exclusion of one due or over due. The election need not be shown by positive proof; it may be proved by circumstances. 3d, No direction or election, either by debtor or creditor, being shown by the proof, or deducible from the circumstances, the law, on certain rules of its own, not necessary to be here considered, makes the application. *Callahan v. Boazman*, 21 Ala. 246; *McDonnell v. Branch Bank*, 20 Ala. 313; *Harrison v. Johnston*, 27 Ala. 445; 2 *Parsons on Contr.* 140-7; 2 *Story on Contr.* §§878 to 880; *Clayton's case*, 1 *Mer.* 607-8; *Gwynn v. Whitaker*, 1 *Harris & Johns.* 751; *Jones v. U. S.*, 7 *How. (U. S.)* 681; *P. M. Gen. v. Furber*, 4 *Mass.* 333; *U. S. v. Wardwell*, 5 *Mass.* 82; *U. S. v. Bradbury*, *Daveis*, 146; *Bodenhall v. Purchas*, 2 *B. & Ald.* 39. We feel safe, however, in holding, that when the law must be appealed to for the rule of application, unaided by facts or circumstances tending to show an application either by the debtor or creditor, the payment must be applied to a debt due, in preference to one not then due.

There is no proof in this record which tends to show that Mr. Bobe, the debtor, gave any direction as to the application of the following payments: \$500, April 16, 1839; \$50, Nov. 1, 1839; and \$100, Nov. 26, 1839. As to the payments of \$500 and \$50, whether we regard the election as made by the creditor or the law, the result is the same. They were paid before the maturity of the third note; and therefore, neither the election of the creditor, nor the intendment of the law, could apply them to the note not then due. They were payments on the second

note; and not being used in defense to the suit on that note, they are lost to the complainants.

[7.] As to the payment of \$100, on 26th Nov. 1839, we think a different rule must govern. That payment was made on the very day on which the third note matured. The creditor having the right to make the application of that sum, we think that, by taking judgment on the second note, for the full amount for which it called, he furnishes evidence that he had elected to place that payment on the third note.

The other payments—viz., March 17, 1840, \$200; May 7, 1840, \$150; Aug. 11, 1840, \$100; March 15, 1841, \$100; were all made after the judgment was recovered. These sums, together with the payment of \$100 on 26th Nov. 1839—making \$650—should be allowed to the complainants, as of the dates when they were severally made.

This result renders a re-statement of the account necessary.

Decree of the chancellor reversed, and cause remanded.

RILEY vs. RILEY.

[APPLICATION FOR PROBATE OF WILL.]

1. *Charge referring legal question to jury.*—It is the duty of the court to determine what facts are necessary to establish the legal signing and attestation of a will: consequently, a charge is erroneous which refers the decision of that question to the jury.
2. *What is sufficient signing of will.*—Under the statute of this State, (Code, § 1611,) the testator's name may be signed for him by another person, in his presence, and by his direction; and such signing may be made for him by one of the subscribing witnesses to the will.
3. *What is sufficient attestation.*—But one of the subscribing witnesses cannot sign the name of another subscribing witness, when the latter is able to write, and does not physically participate in the act of signing.

APPEAL from the Probate Court of Monroe.

IN the matter of the last will and testament of William M. Riley, deceased, which was propounded for probate by Mrs. Ann Riley, the decedent's widow, and which, as copied in the bill of exceptions, was in the following words:

"Wm. M. Riley's will, Sept. 11, 1859. I want T. A. Nettles to have the two black mules, Jim and Dick, and two hundred acres of the best land that I have got. And I want Martha O. Nettles to have the boy Lewis, and the *filie* Jane. And I want my wife, Ann Riley, to have all the balance of my property, both personal and real. Written by T. J. Robbins, in presence of Miss Martha O. Nettles and Mrs. Ann Riley.

And Wm. M. Riley, T. J. ROBBINS, witness.
By request of the above, W. M. RILEY."

Thomas M. Riley and John Riley, as heirs-at-law and distributees of the decedent, filed the following objections to the probate of this paper: "1st, that said pretended will was not duly executed according to law; 2d, that the same was not executed according to section 1611 of the Code; 3d, that the same was not signed by said W. M. Riley, or by any other person for him, in his presence, and by his direction; 4th, that the same was not attested by two witnesses, who subscribed their names thereto in the presence of the said W. M. Riley, as required by section 1611 of the Code; and, 5th, that said W. M. Riley was of unsound mind, and had not capacity to make a will, at the time said instrument purports to have been executed."

"On the trial of the issue joined on these objections," as the bill of exceptions states, "the proponent offered T. J. Robbins as a witness, who testified, that he wrote the instrument propounded for probate, at the request of said W. M. Riley, and subscribed said Riley's name to it as testator, at his request, in his presence, and by his direction; that he also wrote the name of Martha O.

Nettles as a subscribing witness thereto, at the request of said Riley; that said Martha O. Nettles was present at the time, and did not object to his writing her name, but assented and agreed thereto; that said Riley requested him to write the name of said Martha O. Nettles as a witness to said instrument, saying that he (witness) could write better than she could; that said Martha O. Nettles could read and write very well,—perhaps, better than himself; that he also subscribed his own name as a witness to said instrument; that said instrument was written and made on Sunday, the 11th September, 1859; that said Riley was then sober, and, in witness' opinion, of sound mind; and that he (witness) subscribed his own name as a witness to said will, and also the name of said Martha O. Nettles, in the presence, and at the request of the said testator. The proponent then offered said Martha O. Nettles as a witness, who testified, that she was present when said instrument was written; that said Robbins wrote the whole instrument, together with her name as a subscribing witness, in her presence, at the request of said Riley, and in his presence; that she did not object to her name being so written, but assented and agreed thereto; and that she could read and write very well, but did not write her name as a witness to said instrument, or make her mark thereto. The proponent then offered evidence tending to show, that said Riley was competent to make a will, and, at various times, had made declarations of his intention to dispose of his property in a manner similar to the disposition made in said paper propounded for probate. The contestants objected to this evidence going to the jury, until the said paper propounded for probate was in evidence before them; the court overruled their objection, and they excepted. The proponent then offered said paper in evidence before the jury, as the last will and testament of said Riley, without further proof of its execution or attestation; to which the contestants objected, on the ground that it was not shown to be attested by two witnesses as required by the statute. The court overruled their objection, and allowed

said paper to go to the jury; and the contestants excepted.

"This being all the evidence, the court read to the jury section 1611 of the Code, and instructed them, that it was for them to determine from that section, from the evidence before them, from the authorities read, and from the charge of the court, whether or not the paper offered for probate was executed, attested and subscribed according to said section. To this charge the contestants excepted, and then requested the court to instruct the jury, that unless they believed from the evidence that the paper offered for probate was signed by the testator, or by some one for him, in his presence, and by his direction, and was also attested by two witnesses, who subscribed their names thereto as witnesses, they must find for the contestants. The court refused this charge, and the contestants excepted."

The rulings of the court on the evidence, the charge given, and the refusal of the charge asked, are now assigned as error.

J. W. POSEY, for appellant, cited *Lewis v. Lewis*, 13 Barb. 17; *Horton v. Johnson*, 18 Geo. 396; *Campbell v. Logan*, 2 Bradford's Surrogate Rep. 96; 3 *ib.* 227; 13 *Tredell*, 260.

S. J. CUMMING, *contra*, cited *Armstrong v. Armstrong*, 29 Ala. 538; 1 Wms. Exrs. 70; 2 Curteis, 330; 6 Grattan, 57; 16 B. Monroe, 102; 3 Ad. & El. (N. S.) 117; 1 Lomax on Exrs. 60-61.

R. W. WALKER, J.—1. The decree in this case must be reversed. It was for the court to determine what facts were necessary to establish the signing and attestation of the will, within the meaning of the Code. But the effect of the charge given was to refer the decision of this legal question to the jury.—*Thomason v. Odum*, 31 Ala. 108; *Wright v. Bolling*, 27 Ala. 259.

As, however, the main questions presented by the record will doubtless arise on another trial in the probate

court, we deem it proper to express our views in regard to them at this time.

[2.] In order to constitute a valid signing of a will by the testator, it is not essential that he should write his own name. The statute expressly allows the will to be signed by another for him; and his name, when written by another for him, in his presence, and by his direction, will have the same effect as if written by himself.—*Armstrong v. Armstrong*, 29 Ala. 541; 1 Wms. Exrs. 69; Code, § 1611. And though Lord Sugden has expressed a contrary opinion, it seems to be settled, that such signing for the testator may be made by a person who is one of the subscribing witnesses to the will.—*In re Baily*, 1 Curteis, 914; *Smith v. Harris*, 1 Robertson's Eccl. R. 262; 1 Wms. Exrs. 69-70.

[3.] The statute requires the will to be "attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator."—Code, § 1611. The questions we are called upon to decide, are, whether the signature of the witness may be made by another person for him; and if so, whether one witness can subscribe for another witness, who is himself well able to write. While the statute provides, that the will may be signed by "the testator, or some person in his presence, and by his direction," the provision in respect to the attesting witnesses is, that they "must subscribe their names thereto in the presence of the testator." There is certainly much force in the suggestion, that the express allowance of the alternative in one case, with the absence of such allowance in the other, raises a strong inference that the legislature meant to require the actual, personal signature of each witness.

The English statute of frauds (29th Car. II.) required, that the will should be "attested and subscribed, in the presence of the deviser, by three or four witnesses." 1 Jarman on Wills, 112. We have not been able to find any English case, in which it was held, that the signature by another person for a witness is a sufficient subscription by the latter, unless the facts showed a physical participation in the act of signing his name. In *Harrison*

v. Elvin, 3 Ad. & Ell. (N. S.) 117, the witness whose name was written, and who was himself unable to write, held the pen, while the other witness guided his hand; and this was held a valid subscription. See also, to the same effect, Campbell v. Logan, 2 Bradford's Surr. R. 96-7.

On the other hand, it seems to be settled in the ecclesiastical courts in England, that one of the attesting witnesses cannot subscribe for another. In *In re White*, before the prerogative court, (7 Jurist, 1045,) the will was written for the deceased by a Mr. Culverhouse, and was signed by the deceased, in the presence of Mr. and Mrs. Culverhouse, both being present at the same time; Mr. Culverhouse subscribed his name as a witness, in the presence of the testator and his own wife, and also subscribed the name of his wife as the second witness. Dr. Haggard moved for probate, and submitted, that the rule "*qui facit per alium, facit per se*," applied. Sir H. Jenner Fust, in passing upon the motion, said: "It is impossible to grant probate of this paper. Why did not Mrs. Culverhouse make her mark at the foot of the will? Motion rejected." We have no access to the volume in which the case just cited is reported, and find the foregoing statement of it in Horton v. Johnson, 18 Geo. 397. The same case is referred to in Campbell v. Logan, 2 Bradf. Surr. R. 96, where it is cited from 2 Notes of Cases, 461. It is there said by the surrogate, that "the judge put the decision on the ground, that the statute did not authorize any person to subscribe the witnesses' names—that the act required both witnesses to subscribe, 'either by signature or mark.'" See, also, 1 Lomax Exrs. 88; 1 Wms. Exrs. p. 79, note (d.)

The point is decided in the same way in *In re Hannah Cope*, 2 Rob., 335. In that case, a testatrix, having signed her will, desired M. C. and E. T. to attest; but, as E. T. could not write, the testatrix desired J. J. C., who was also present, to write the name of E. T., which J. J. C. did, but did not sign his own name; held, that the paper was not entitled to probate, as E. T. might have made his mark, and that a desire that another should sign could not be construed to be a subscription by E. T.

So it has been held, that the acknowledgment by a witness of a signature previously made, is not a subscription within the meaning of the statute.—*Playre v. Scriven*, 1 Robertson's Eccl. R. 774. In that case, an attesting witness, on the re-execution of the will, traced over his previous signature with a dry pen; and he was held not to have *subscribed*, but only to have *acknowledged* his signature, which was not sufficient. Sir H. Jenner Eust said: "The witnesses are to *subscribe*; in other words, they are required, I conceive, to do an act which shall be apparent on the face of the will." To *subscribe*, is defined to be, "to set one's hand to a writing," (*Pridgen v. Pridgen*, 13 Ired. 260,) and this the act requires the witnesses to do.

The rule adopted in the English cases, cited above, that one witness cannot subscribe for another, unless the latter makes his mark to his name as written, or otherwise physically partakes in the act of subscription, is approved of in *Campbell v. Logan*, (2 Bradf. Surr. R. 96-7.) and in *Meehan v. Rourke*, (*ib.* 392.) In the former case, the surrogate said: "There is nothing in the statute, authorizing one witness to sign the name of another witness." But he conceded, that where the facts show a physical participation of the witness in the act of signing his name, this is a sufficient compliance with the statute. In *Meehan v. Rourke*, *supra*, it is said: "The statute of 1 Vic. c. 26 requires the witnesses to 'attest' and 'subscribe' the will; and this, it has been decided, may be done by signature or mark; but the witness must, in either case, partake in the physical act of subscribing."

The English rule has also been followed by the supreme court of Georgia. Where a will was subscribed in the presence of the testator, by two witnesses, each for himself, and one of them for a third person, all being present at the same time, it was held, that this was an insufficient attestation under the statute of frauds. The third witness, who could not write, should have made his mark. *Horton v. Johnson*, 18 Geo. 396. See, further, *Dayton on Surrogates*, 99-101, and notes.

A different rule has been adopted in Virginia and Ken-

tucky. In both of those States, it is held, that where the name of one witness is signed by another, at the request of the former, this is a valid subscription, although the witness whose name is thus signed does not make a mark, or otherwise partake in the act of signature.—Upchurch v. Upchurch, 16 B. Monroe, 102; Jesse v. Parker, 6 Gratt. 57. In this latter case, the attestation was held good, although it was shown that the witness whose name was signed by another was able to write.

Without now saying whether an actual physical participation of the witness in the act of signing is, in all cases, essential to a valid subscription of his name, we are not willing to go so far as to hold, that one subscribing witness may sign for another, *who is himself well able to write*, and who does not in any way join in the physical act of subscription. Whatever may be the rule in reference to witnesses who are not able to write, we think, that where a witness is himself well able to write, the subscription of his name by another subscribing witness ought not to be deemed a compliance with the statute.

The evidence set out in the record shows, that the will was written and signed for the testator by one Robbins, who subscribed his own name as a witness, and also the name of the other witness; the latter not partaking, otherwise than by a simple assent, in the act of signature, although she "could read and write very well; perhaps, better than Robbins himself." To hold that these facts amounted to a valid execution and attestation of the will, would certainly weaken the safeguards against frauds and forgeries, which it was the purpose of the statute to provide. It is manifest that the signatures of the witnesses, written by themselves, furnish a reliable foundation for those legal presumptions in favor of the due execution of a will, which arise upon proof of the handwriting of the witnesses, when they are dead or out of the State. We think we consult sound public policy in deciding, that one of the subscribing witnesses to a will cannot sign the name of another who is himself well able to write, and who does not physically participate in the act of signing.

Decree reversed, and causé remanded.

THOMPSON vs. MARSHALL.

[BILL IN EQUITY FOR REFORMATION OF CONTRACT.]

1. *Insufficient attestation of instrument sought to be reformed.*—It is no objection to the reformation of a conveyance, embracing both real and personal property, that it is not attested in such manner as is necessary to pass the title to the realty.
2. *Laches.*—The lapse of three years, between the discovery of the mistake and the filing of the bill to correct it, does not show such laches as will deprive the party of the right to relief, when it appears that the defendant was insolvent, and that the plaintiff made repeated efforts to have the mistake corrected without the expense of a lawsuit.
3. *Maintenance.*—A contract, by which one of the defendants to a pending chancery suit, having a common interest with the other defendants in resisting the relief sought, purchases from the others their interest in the property in litigation, with "the hires, rents and damages" which may accrue in the suit, and assumes a liability for their share of the costs and expenses of the suit, is not obnoxious to the charge of maintenance.
4. *Adverse possession.*—The validity of a conveyance, *inter partes*, not being affected by the fact that the property was adversely held at the time of the execution of the instrument, such adverse possession constitutes no objection to the reformation of the instrument in equity.
5. *Statute of frauds.*—The fact that a contract in writing, signed by only one of the parties, contains stipulations to be performed by the other which are within the statute of frauds, will not prevent a reformation of the instrument in equity at the suit of the latter.
6. *Execution and mutuality of contract.*—An instrument in writing, in form a deed, which, after reciting the terms of a contract, whereby the grantor agreed to sell and transfer to the grantee his interest in certain real and personal property then in litigation, conveys the property by proper words, becomes binding on the grantor when signed, sealed and delivered by him, and does not require to be executed by the grantee, although it recites the stipulations of the contract to be performed by him.

APPEAL from the Chancery Court of Choctaw.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed, on the 29th December, 1857, by Matthew A. Marshall, against John B. Thomp-

son and James H. Thompson; and sought the reformation of a contract between the parties, which is hereinafter set out. It alleged, in substance, that on the 12th June, 1847, James Thompson conveyed by deed certain real and personal property to John B. Thompson and William H. Thompson, his sons, taking their notes for the purchase-money, with a deed of trust on the property to secure their payment; that on the 21st September, 1847, said John B. and William H. Thompson conveyed the same property by deed to James H. (son of said John B.) and William W. (son of said William H.) Thompson, and took their two promissory notes, for \$5,000 each, for the purchase-money; that this latter sale was not *bona fide*, and was wholly abandoned by all the parties long before the 1st January, 1854; that on the 9th November, 1847, said James Thompson filed a bill in equity against said John B. and William H. Thompson, with others, for the purpose of setting aside and rescinding the said sale and conveyance of the 12th June, 1847; that while the suit was still pending, complainant proposed to said John B. Thompson "to give him \$2,000 for his rights and interest in the property involved in said suit, and in any claim or demand which might result from the decision of said suit, in the event that the same should be decided in favor of the defendants thereto, and pay half the amount that should ultimately be found due on the notes executed by him and the said William H. to the said James Thompson;" that this proposition was accepted by said Thompson, and an attorney was selected to draw up the contract; that the instrument drawn up by the attorney, which was executed by the said John B. and James H. Thompson on the 23d January, 1854, and which was made an exhibit to the bill, instead of binding the complainant to pay one-half the amount that might ultimately be found due on the notes executed by said John B. and William H. to James Thompson, provided, by mistake, that he should pay one-half of the two notes executed by the said James H. and William W. to the said John B. and William H. Thompson; that this mistake was discovered by the complainant in

May, 1854; that he made immediate application to the defendants to have it corrected, but they refused to correct it: and that John B. Thompson being insolvent, complainant delayed filing a bill in chancery for the correction of the mistake, because he desired to avoid the costs and expenses of the suit, until the defendant's repeated refusals to correct the mistake left him no other alternative. The prayer of the bill was for a reformation of the instrument, and for general relief.

The instrument sought to be reformed is as follows:

“State of Alabama, } Know all men by these presents,
Sumter county. } that whereas,” &c., (reciting the conveyance by James Thompson to John B. and William H. Thompson, the conveyance by said John B. and William H. to said James H. and William W. Thompson, the institution of the suit by said James Thompson for the purpose of rescinding the conveyance first referred to, “to which suit said Matthew Marshall is made a party defendant, and which is still pending;”) “and whereas the said John B. and James H. Thompson have agreed to sell and convey to said Matthew A. Marshall the rights, interests, claims and demands, which they jointly have, and each or either of them severally has, in and to the property, real and personal, embraced and included in said deeds, and appertaining to, or arising from or out of said conveyances, with all the rights, interests, claims and demands, which appertain to them and each of them, or which may result to them or each of them, jointly or severally, from a successful termination of said chancery suit in their favor, in consideration that said Marshall will pay the one-half part of two notes executed by said James H. and William W. Thompson, for \$5,000 each, (one of which was made payable on the 1st January, 1854, and the other on the 1st January, 1855, with interest from the 1st January, 1852; and which said notes were given by them in consideration of the property conveyed by said John B. and William H. to said James H. and William W. Thompson, by said deed dated the 19th September, 1847, as by reference to said deed will more fully appear,) and will also pay to said

John B. Thompson the further sum of \$2,000: Now therefore these presents witness, that for and in consideration of the sum of \$5,000, together with the interest on \$2,500 from the 1st January, 1851, and interest on \$5,500 from the 1st January, 1852, to be by said Marshall paid on the notes hereinbefore referred to, so as to pay and discharge the one-half part of said notes, and the further sum of \$2,000, to be paid by said Marshall to said John B. Thompson,—we, the said John B. Thompson and James H. Thompson, have bargained and sold, and, by these presents, do give, grant, bargain, sell, convey, set over and confirm, unto the said Matthew A. Marshall, his heirs and assigns, all the right, title, interest, claim and demand, which we jointly have, and which each or either of us severally hath, in and to the following described lands;” (describing them;) “and also all the right, title, interest, claim and demand, which we jointly have, and which each or either of us severally hath, in and to the aforesaid slaves; and also all the right, title, interest and claim, which we jointly have, and which each or either of us severally hath, in and to the increase of the females of said slaves, which have happened since the making of the aforesaid bill of sale and deed, or which may hereafter happen; and also all the right, title, interest and claim, which we jointly have, and which each or either of us severally hath, in and to the personal property, of every description whatsoever, consisting of horses, mules, cattle and hogs, and all other property embraced in said deeds; and also all the rights, claims and demands, which we jointly have or may have, or each or either of us hath or may have, to hires, rents and damages, against any, every and all persons, in the event of the termination of said chancery suit in favor of the defendants thereto: to have and to hold unto the said Matthew A. Marshall, and to his heirs and assigns, all the rights, titles, interests, claims and demands, both at law and in equity, which we can or may have jointly, and which each or either of us can or may have severally, in and to said real and personal property, under and by virtue of said bill of sale and deeds, or in any or either of them, or

which have accrued to us or either of us in respect to said property in any way whatsoever, as also all the rights, claims and demands to rents, hires and damages, which have or may accrue to us or either of us in said chancery suit, unto the said Marshall, his heirs and assigns, to his and their use and behoof forever; and all such right, title, interest, claim and demand, in and to said real and personal property, as we jointly have, and as each of us severally hath, we do promise, covenant and agree with the said Marshall, that we will, and that our heirs, executors and administrators shall, forever warrant and defend unto the said Marshall, his heirs and assigns. It is understood and agreed, by and between the parties to these presents, that if the said chancery suit shall be finally decided and determined against the defendants thereto, then, and in that event, the bargain and sale hereinbefore stated shall be of none effect, the said Marshall shall not be bound to pay the consideration hereinbefore mentioned, or any part thereof, and this instrument and conveyance shall thenceforth be inoperative and void. Witness our hands and seals, this 23d January, 1854.

JAMES H. THOMPSON, [seal.]

JOHN B. THOMPSON, [seal.]

The defendants filed separate answers; denying the existence of the alleged mistake; insisting that the conveyance, a reformation of which was sought by the bill, was incomplete and ineffectual, was champertous, was within the statute of frauds, and was inoperative and void, because the property embraced in it was, at the time of its execution, in the adverse possession of a third person; and demurring to the bill, for want of equity.

On final hearing, on pleadings and proof, the chancellor overruled the demurrer, and rendered a decree for the complainant; and his decree is now assigned as error.

WM. BOYLES, with J. L. SMITH, for appellant.—1. The instrument sought to be reformed is incomplete and ineffectual, because signed by only one of the parties to the contract. Not being executed by the complainant,

and therefore not binding him, it is wanting in that mutuality and reciprocity which are necessary to constitute a valid contract.—Chitty on Contracts, 11, 15, 16, 350; 12 Johns. 191; 27 Ala. 629; 30 Ala. 366; 13 Ala. 835; 10 Ala. 916.

2. As a conveyance of the land, said instrument is void and inoperative, because neither attested by a witness, nor acknowledged by the party signing it.—Code, §§ 1266–67. The contract being entire, if part of it is inoperative, no part can stand.—Chitty on Contracts, 272, note 1; 15 Pick. 159; 5 Cowen, 162; 30 Ala. 679.

3. The contract is void under the statute of frauds, as to the complainant, because there was no writing signed by him, nor was any part of the purchase-money paid, nor was he put in possession of the property.—Code, § 1551; Chitty on Contracts, 340, 352; 6 East, 307; 11 East, 142, note. Not being binding on the complainant, he cannot enforce it against the defendant.—Authorities cited in 1st paragraph, *supra*.

4. At the time the contract was entered into, the property was in the adverse possession of a third person; consequently, the sale is void.—5 Mass. 236; 11 Mass. 554; 3 Mass. 573; 2 How. (Miss.) 347; 5 Peters, 436; 8 Johns. 120; 1 N. C. Rep. 114; 4 Kent's Com. 446; 3 John Ch. 101; 24 Wendell, 587; 1 Peters' C. C. 49; 1 Munford, 162; 2 Bacon's Abr. 186. The deed being void on this account, no act done under it can render it valid.—2 Parsons on Contracts, 264, and cases there cited.

5. The contract is void for champerty.—Poe v. Davis, 29 Ala. 683; 18 Vesey, 127; 3 Vesey, 493; 7 Bing. 378; 3 Sandf. 429, and cases there cited. That parol evidence was admissible, to prove the complainant's promise to pay the costs of the suit, see 4 J. J. Mar. 121; 1 McLean, 194.

6. The complainant admits his discovery of the alleged mistake more than three years before the filing of the bill, and shows no excuse for his unnecessary delay.

T. REAVIS, *contra*.—1. The lapse of three years after the discovery of the mistake, before the filing of the bill

to correct it, is not unreasonable in itself, nor sufficient to bar the right to relief on the ground of laches. If it were, however, the delay in this case is satisfactorily explained by the defendant's insolvency, and the complainant's repeated efforts to get the mistake corrected without the expense of a chancery suit.

2. If the deed be void as to the land, for want of attestation, that would be no objection to having the mistake corrected, so as to relieve Marshall from paying the wrong note. So far as the title to the personal property is concerned, a witness to the deed was not required; nor was a witness necessary, at common law, to a deed for land.—2 Bla. Com. 307, note 18. The Code directs the attestation of a witness, but does not declare the deed void for want of it.

3. Marshall accepted the deed, although he did not sign it, and thereby bound himself to performance; and having performed all the stipulations on his part, and that performance having been accepted by Thompson, the contract was binding on the latter. These rules apply as well to the statute of frauds as to mutuality.—*Phelps v. Townsend*, 8 Pick. 302; *Wardens v. Robertson*, 5 Man. & Gr. 131, mar.; *Wetumpka Railroad Co. v. Hill*, 7 Ala. 772; 1 *Parsens on Contracts*, 376.

4. The contract is not obnoxious to the charge of maintenance. The complainant was a party to the chancery suit, and had a legal interest in defending it; consequently, he had a right to purchase the interest of a co-defendant.—*Thalhimer v. Brinkerhoof*, 3 Cowen, 623; *McCall v. Capelhart*, 29 Ala. 521. A contract for the purchase of property which is in litigation is valid, provided the purchaser does not undertake to pay any costs.—2 *Story's Equity*, §§ 1048 & 1050; 4 *Durn. & East*, 349; 5 *Bing*, 309; *Camp v. Forrest*, 13 Ala. 119; 3 *Cowen*, 623. The written contract contains no stipulation for the payment of costs, and parol evidence could not be received to add that stipulation to it.

5. The facts do not sustain the defense of adverse possession. It appears that James Thompson, the plaintiff in the chancery suit, had obtained a writ of seizure, under

which the possession of the property was restored to him, and had given bond to have it forthcoming to abide the final determination of the suit; and that he had conveyed it to the sureties on his bond, as an indemnity against their liability. On these facts, the property was in the custody of the law, and the doctrine of adverse possession does not apply.—*Atwood v. Pierson*, 9 Ala. 656; *Jackson v. Gewin*, 9 Ala. 114. Moreover, if there had been an adverse possession of the property, that would not affect the validity of the deed *inter partes*.—*Harvey v. Carlisle*, 23 Ala. 635; *Abernathy v. Boazman*, 24 Ala. 189.

A. J. WALKER, C. J.—We need not inquire, whether, for the want of the attestation of one witness, or an acknowledgment in pursuance of the statute, the conveyance to the appellee is ineffectual to pass the title to the real estate described in it.—Code, §§ 1266–1267. It embraces personalty as well as realty, and its invalidity as to the realty would not impair the right to a reformation of the contract sought by the bill.

[2.] The complainant has not been guilty of such laches as to deprive him of the right to the relief prayed.

[3.] The mistake alleged in the bill is proved by the evidence. It is contended, however, that there can be no reformation of the contract, because it involves the offense of champerty, or maintenance. The features of the contract referred to, as supporting the charge of maintenance, are, that the complainant became a purchaser, pending a suit to rescind the conveyance under which his vendor held: that he takes a transfer, not only of the property in litigation, but also of such “rents, hires and damages,” as might accrue in the suit for rescission; and that, as shown by parol evidence, he assumed a liability for his vendor's share of the costs and expenses of the suit.

The complainant in this case was a party to the suit for rescission. After the purchase of his vendor, and before the commencement of the suit to rescind the sale to his vendor, he bought the crop of cotton upon the land sold to his vendor; and one of the objects of the suit for rescission was, to charge the complainant in this case,

Marshall, on account of the crop of cotton so purchased by him. He was charged in the bill to have taken the cotton with notice of the fraud, upon which the prayer for relief was predicated. From these facts it results, that Marshall, the complainant in this case, had an interest in the suit for a rescission, in common with his co-defendant, from whom he purchased pending the suit against them. He and his vendor had a community of interest in resisting the rescission sought, because fraud in the transfer to the latter, and a consequent right of rescission, was alleged as the common cause of relief against both. Because the complainant in this case was thus interested with his vendor in the suit pending at the time of his purchase, he is not chargeable with maintenance.

Maintenance, of which champerty is a species, is said to signify "*an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hinderance of common right.*" 1 Hawkins' Pl. 454. It is also said to be "*an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.*"—4 Bla. Com. 134. The gist of the offense is, that the intermeddling is *unlawful*; that it is *officious*, and in a suit *which no way belongs* to the intermeddler. This essential element of the offense is absent here. The suit for rescission was as well the suit of the complainant as of his vendor. The most efficient mode of protecting himself against a decree was to contest the point upon which the liability of his co-defendant, from whom he purchased, depended. The intermeddling of one with a suit, in reference to which he occupies such a relation, has never been considered officious, or unlawful; but has always, upon the plainest dictates of reason and justice, been sanctioned. Hawkins, in treating of the question, how far acts of maintenance are justifiable in respect of an interest in the thing in variance, lays down the doctrine, that those who have either a certain or a contingent interest in land, or who have a common interest with the party in the same thing, as in a way, church-yard, or common, may intermeddle in suits pertaining to such matters.—1 Hawkins' Pl. 456, 457, 458.

Upon the same principle, which underlies the examples put by Hawkins, it has been decided, that a second mortgagee may lawfully purchase the interest of a prior mortgagee, which was in litigation, and contract to indemnify the latter against past and future costs, where the claim asserted against the prior mortgagee might affect the second mortgagee.—Hunter v. Daniel, 4 Hare, 420. And it has been decided, that where several proprietors of land in a parish have a common interest in resisting a claim of tithes, asserted against tenants of the respective lands, one of them would not perpetrate the crime of maintenance, by assisting in suits brought to enforce the claim as to other lands than his in the parish. Findon v. Parker, 11 M. & W. 675. And in Massachusetts it has been held, that where two persons had distinct rights to the exclusive enjoyment of a patent at different places, near each other, a contract by one to prosecute a suit for the infringement of the other's exclusive right to the enjoyment of the patent in the particular locality, in consideration of one-half the recovery, was not champertous.—Call v. Calf, 13 Mete. 362. This last decision is put upon the ground, that as the two places were near each other, the unauthorized use of the patent in one place would diminish the value and profits of the patent in the other; and that, therefore, each had an interest in preventing the infringement of the other's right. The elementary writers upon equity also assert the principle, that the doctrine of champerty and maintenance can not be applied to one having an interest in the subject in dispute.—2 Story's Eq. Ju. 1048 a; 2 Spence's Eq. Jur. 872. And this court itself, in McCall v. Capehart & Harbin, (20 Ala. 521,) has recognized and acted upon the same principle.

[4.] It is contended, that the property conveyed by the deed sought to be reformed was adversely held at the time of the conveyance. If that be so, it makes no difference in this case; for the deed would, nevertheless, be valid *inter partes*.—Harvey v. Carlisle, 23 Ala. 635; Abernathy v. Boazman, 24 Ala. 189.

[5.] If the complainant's promise to discharge the du-

ties imposed upon him by the contract specified in the instrument to be reformed is within the statute of frauds, it would not, of itself, be a sufficient reason for refusing to reform the instrument. The instrument itself is in writing. If the complainant had refused to perform the contract on his part, there might be some reason for withholding the desired decree of reformation. But no reason for refusing the decree exists, when the complainant does not seem to have omitted the performance of any duty imposed upon him by the contract.

[6.] We do not concur with the counsel for the appellant in the position, that the instrument described in the bill was incomplete until it was executed by the complainant. It was binding upon the defendants as soon as it was delivered.

The decree of the chancellor is affirmed.

IN RE CARMICHAEL.

[INQUISITION OF LUNACY.]

1. *Form and applicability of verdict.*—It is the superior and more satisfactory practice to have the verdict in the very language of the statute, (Code, § 2753,) or its substance.
2. *Meaning of non compos mentis.*—The term *non compos mentis* denotes neither mere mental weakness, nor a total deprivation or destruction of the intellectual powers, but simply unsoundness of mind.
3. *Proof of non compos mentis.*—The fact that a person makes one or more improvident bargains, or is generally unthrifty or unsuccessful in his business, does not, *per se*, prove him to be *non compos mentis*; but it is admissible evidence, in connection with facts and circumstances tending to show mental unsoundness.
4. *Opinion of witnesses as to loss of sanity.*—On the question of sanity or insanity, a witness who, though not a physician, has had an intimate acquaintance with the party, may give his opinion, in connection with the facts on which it is based; *scilicet*, as to one who has had a mere passing acquaintance, or brief and occasional interviews on general or indifferent subjects.

5. *Relevancy and admissibility of evidence on question of sanity.*—On the trial of an inquisition of lunacy, a witness cannot be asked, "whether his brother did not control the defendant and his business;" nor, "whether he is not going down hill generally;" nor, "whether his appearance was that of a man of sound or unsound mind;" nor can he be allowed to state "the impression that the defendant made on his mind;" nor what the petitioner, who was the defendant's brother, told him on different occasions about the defendant's behavior.
6. *Opinion of physician.*—A practicing physician, who states that, "having been requested to examine the defendant, in order to test the condition of his mind, he met and conversed with him, and noticed his general expression and appearance, but had formed no settled opinion as to the depth of his mind," may be asked whether he discovered any evidence of unsoundness of mind, and may state his opinion on the question of sanity *vel non*.
7. *Cross-examination of witness.*—If a witness declares bias, partiality, or corruption, the appellate court will lay down no rule as to the questions which may be asked him on cross-examination: "that must be, in a great degree, left to the discretion of the presiding judge."

APPEAL from the Probate Court of Talladega.

IN the matter of Malcolm Carmichael, on the petition of his brother, Daniel Carmichael, to have him declared *non compos mentis*. The principal matters here assigned as error are the several rulings of the court on the trial, which are thus stated in the bill of exceptions:

"The petitioner introduced as a witness one Geo. Melb. Patterson, who testified, that he had known the defendant sixteen or seventeen years; that he now lives about fifteen miles from him, and knows him as intimately as he knows his other neighbors; that he lived within four or five miles for five or six years, and within two miles for four or five years; that he saw him frequently, and knew of the following business transactions with him: he had hired a negro man to him (witness) at \$10 per month, which was a fair price; witness had ginned some cotton for him and one Shaw, which they afterwards took to the Wetumpka market, and on the returns, which witness saw, the smallest bag was marked to the defendant, although he had brought to the gin one hundred pounds more than Shaw; and he sold a negro woman and five

children, to one McNeill, for \$1,300. From these facts, and the general appearance and conversation of the defendant, the petitioner asked said witness to give his opinion as to the soundness of the defendant's mind. The defendant objected to this question, on the ground that it was illegal, and that the witness had not laid a sufficient predicate to give an opinion. The court overruled the objections, and the defendant excepted. The witness also stated, on his direct examination, that he refused to trade with the defendant on one occasion, without the consent of Daniel Carmichael; which answer the defendant moved to exclude, and excepted to the overruling of his motion. The petitioner then asked the witness, whether or not Daniel Carmichael controlled the defendant and his business; to which question the defendant objected, and excepted to the overruling of his objection."

"The petitioner also introduced one Daniel McDearmid, who stated, that he had known the defendant for sixteen or seventeen years, had frequently conversed with him, lived within two or three miles of him, met him frequently, and had some business transactions with him; that he had sold a beef to the defendant at \$10, which defendant told him was worth \$12 or \$13, but did not offer him that much; that one of his neighbors, wanting to hire a small boy, plow and horse, to plow in wheat, offered defendant one bushel of wheat per day for them, but defendant said a half-bushel was enough; that he saw one of the defendant's negroes, when defendant was not present, in the woods hunting; and that the defendant stammers, and steps high. Upon these facts, the petitioner asked the witness his opinion as to the soundness of the defendant's mind. The defendant objected to the question, and excepted to the overruling of his objection." This witness having further stated, that the defendant had been living by himself on his farm for five or six years, the court permitted the petitioner to ask him these questions: "Has he made a living each and every year since he has lived there?" "Is he not going down hill generally?" "Has he less property now than he had some

years ago?" The defendant objected to each of these questions, "as illegal, irrelevant, and leading;" and reserved exceptions to the overruling of his several objections.

"The petitioner then introduced one Thomas Smith as a witness, who stated, that he had known defendant for sixteen or seventeen years, had a passing friendly acquaintance with him, and had talked with him frequently; that defendant has a hesitancy in talking, lives some ten or twelve miles from him, and knows something about the price of goods; that he (witness) sold him a few goods, and he always made his settlements correctly; that he offered defendant a piece of goods at sixty cents a yard, but defendant refused to give it, and said that twenty-five cents was enough. Upon these facts, and from the general appearance of the defendant, the petitioner asked the witness his opinion as to the soundness of the defendant's mind." To this question, and to the answer thereto, the defendant objected; the court overruled the objections, and the defendant excepted.

The petitioner also introduced as a witness one Wayman Adair, who testified, "that he had known defendant several years, met him in passing, and had some conversation with him; that he had lived within two or three miles of him for three or four years, and now lives ten or twelve miles from him; that he is a man who does not talk much; that he had known him to buy a piece of land, but thought he gave a long price for it; that he also knew of the sale of the negroes to McNeill at \$1300, and considered them worth \$1800, sound or unsound." On these facts, the court allowed this witness, against the defendant's objection, to state his opinion as to the soundness of the defendant's mind; to which the defendant excepted.

James H. Joiner, another witness introduced by the petitioner, testified, "that he lived about twenty-six miles from the defendant, had met him only twice, and had a short conversation with him each time; that in one of his interviews with him the defendant had some little slips of paper with figures on them, and asked him to

print them for him; that he refused to do so, and that the defendant looked rather peculiar." The court permitted the petitioner to ask this witness, "What was the defendant's appearance? was it that of a man of sound or unsound mind?" "and to state to the jury the impression that the defendant made on his mind." The defendant objected to each of these questions, and reserved exceptions to the overruling of his objections.

A. D. Levi, another witness of the petitioner, stated, "that he had known the defendant for fifteen or sixteen years, but had never conversed much with him; that he had stayed at the same house with him for three months, but only saw him at night and morning: that the negroes would not obey the defendant sometimes, when he called them to get up and make a fire; and that he was never over the defendant's farm." On these facts, the court permitted the witness to be asked his opinion as to the soundness of the defendant's mind; to which he answered, "His mind is not altogether sound." To this question and answer, each, the defendant objected; and reserved exceptions to the overruling of his objections.

"J. M. Munroe, another witness for the petitioner; stated, that the defendant had acted as bailiff in his beat, and had been deputed on one occasion, by one of the acting magistrates of the beat, to levy an attachment on a trunk to save a debt due him; that he pointed out the trunk to the defendant, who made the levy and return properly and regularly. The petitioner then asked the witness, 'Did not Daniel Carmichael enjoin upon you to go with the defendant, and see that he executed the process properly?'" The court allowed the question to be asked and answered, against the defendant's objections, and he excepted.

"Robert McMillan, another witness for the petitioner, stated, that the defendant had lived with Daniel Carmichael several years ago, and, on one occasion, started on a trip to Tuskaloosa for said Daniel, with his wagon and team, to move a man by the name of Barker; that when he got to Tuskaloosa, he engaged to move said Barker to Mississippi; that when he got to Mississippi, Barker would

not or could not pay him, and he was out of money, and swapped off one of the horses out of the team to get money to bear his expenses home; that he was gone about six weeks, and that Daniel Carmichael started after him; and that said Daniel told him (witness) that he met defendant, and put a barrel of whiskey in the wagon, and the barrel was in the wagon when it and the defendant got home. The defendant moved to exclude that part of the answer containing Daniel Carmichael's declaration, because it was illegal and irrelevant; and excepted to the overruling of his objection."

"The defendant introduced one Malcolm McMillan as a witness, who testified, that he had known the defendant for six or seven years, lived within two miles of him, had met and conversed with him frequently on various topics, and was intimately acquainted with him; that he had sold him a steer for twenty bushels of wheat, and ground the wheat for him, and defendant sold the flour for \$20 80, which was a fair price for the steer; that he had first offered the defendant fifteen bushels of wheat, but he refused to take it; and that the defendant was a close dealer. When called upon by the defendant, upon the above facts, to state his opinion, the witness answered, 'His mind is sound, so far as I am able to judge from my observations, transactions, and acquaintance with him; I think him capable of managing and controlling himself and his own affairs.'" The court excluded this answer, on the petitioner's motion, and the defendant excepted.

"The defendant also introduced as a witness one John B. Brown, who testified, that he had known the defendant, intimately, for twenty years, had lived within a mile and a half of him, and had repeated and frequent intercourse with him; that his daughter had sold a mule to the defendant at \$75; that it was a good mule, and worth at least that much; that the defendant's deportment and behavior were good and unexceptionable; that his mind was not bright, but he was fully competent to take care of, manage and control himself and his property; and that he (witness) was neither an expert nor a physician." The court allowed the petitioner, on cross-examination,

to ask this witness the following question: "Suppose a man had ten negroes, and should sell five of them for \$1300, and failed every year to make a support, and had to buy corn, meat and provisions every year, and his property wasting and diminishing every year, and he was going down hill generally, would you consider him a man of sound mind?" The defendant objected to this question, "as being illegal and irrelevant," and reserved an exception to the overruling of his objection.

"The defendant introduced as a witness one M. Robinson, one of the acting justices of the beat, who testified, that he had known the defendant for sixteen or eighteen years, and, until recently, lived within a quarter of a mile of him; that he had met him, and conversed with him frequently on various topics; that his mind was sound; that he frequently acted as bailiff, being deputed by him (witness,) and always did the business correctly, and with judgment." The court allowed the petitioner, on cross-examination of this witness, to ask him the following questions: "Was he not appointed bailiff just because no one else would have it?" "Do you not know that, if it had been a profitable business, somebody else would have had it?" "Was it not an unprofitable business in the beat?" To the allowance of each of these questions the defendant excepted.

"The defendant introduced as a witness Dr. William Taylor, who testified, that he was, and had been for six or eight years, a practicing physician; that having been requested to examine the defendant, in order to test the condition of his mind, he met and conversed with him, and noticed his general appearance and expression; but that he had formed no settled opinion as to the depth of his mind. The defendant then asked said witness, if he had discovered any evidences of unsoundness of mind; but the petitioner objected to the question, and the court sustained the objection: to which the defendant excepted." The defendant then proposed to ask the witness, "if the defendant was a lunatic," "if he was an idiot," and "if he was *non compos mentis*;" and reserved excep-

tions to the rulings of the court in sustaining objections to said questions.

The court charged the jury, at the request of the petitioner, as follows:

"1. This proceeding is not a criminal prosecution, but is humane in its purposes, and intended to secure the protection of the defendant's property.

"2. If the jury believe from the evidence that the defendant is of unsound mind, to an extent to render him incompetent to manage his affairs, then they will find for the petitioner.

"3. Many improvident trades, made by the defendant, will authorize the jury to find him *non compos mentis*."

The defendant excepted to each of these charges, and then requested the court to charge the jury—

"1. That the simple fact that the defendant has made an improvident trade, such as a court of equity would set aside, will not authorize them to find him *non compos mentis*.

"2. Before the jury can find a verdict which will have the effect of having a guardian appointed for the person and property of the defendant, they must be satisfied from the evidence that his mind is now in such a condition that, if it had been so from his birth, he would have been an idiot."

The court refused to give either of these charges, and the defendant excepted to their refusal.

The jury returned a verdict in these words: "We, the jury, find the defendant *non compos mentis*." The defendant moved to set aside this verdict, and to be discharged, "on the ground that it was illegal and insufficient;" and excepted to the overruling of his motion.

All the rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

JAS. B. MARTIN, for appellant.

L. E. PARSONS, *contra*.

STONE, J.—As this case must be reversed on several of the rulings of the court, after noticed, we will not de-

cide whether the verdict was sufficient. We will state, however, that, as no record is made in the probate court of the fact that the person is idiot, lunatic, or *non compos mentis*, other than that afforded by the recording of the petition and proceedings thereon, it would be the safer and more satisfactory practice to have the verdict in the very language of the statute, or its substance.—Code, § 2753; *Lary v. Craig*, 30 Ala. 631.

[2.] We do not subscribe to the proposition, that the term *non compos mentis* necessarily denotes a total deprivation or destruction of the intellectual powers. It denotes unsoundness of mind; not mere mental weakness, but a diseased or unhealthy mind.—Code, § 1; *Rawdon v. Rawdon*, 28 Ala. 567, and authorities cited; *McElroy v. McElroy*, 5 Ala. 83; *Stewart v. Lisenard*, 26 Wend. 255; *Dew v. Clark*, 5 Russ. 163; 1 Jarman on Wills, marg. p. 27, note 1; *Stubbs v. Houston*, 33 Ala. 555.

[3.] That a person makes an improvident bargain, or many improvident bargains; that he is generally unthrifty in his business, or unsuccessful in one or many enterprises, does not, *per se*, prove him to be *non compos mentis*. These may co-exist with a mind perfectly and legally sound.—1 Beck's Med. Jur. 745. Such testimony is certainly admissible, in connection with facts and circumstances tending to show mental aberration. Shrewdness in trade, and general success in business, would go far to rebut inconclusive testimony of mental unsoundness. So, improvidence and recklessness in trade would render much more satisfactory and convincing circumstantial evidence which tended to prove mental aberration.

[4.] How far, and under what circumstances, a witness who is not a physician may give his opinion on the question of sanity, is a question which has been frequently before this court.—See *State v. Brinyea*, 5 Ala. 241; *Bowling v. Bowling*, 8 Ala. 538; *Roberts v. Trawick*, 13 Ala. 68; *Florey v. Florey*, 24 Ala. 241; *Powell v. The State*, 25 Ala. 21; *Stubbs v. Houston*, 33 Ala. 555. The following principles seem to be deducible from our decisions: 1st. that a non-professional witness cannot give his opinion on the question of sanity *vel non*, except in con-

nection with the facts on which it is based; 2d, that facts, and particular acts and conduct of the person whose sanity is in issue, are competent evidence to go before the jury; 3d, that to justify the opinion of such witness, it must appear that he occupied a position toward the person alleged to be insane, which enabled him to form a correct judgment as to his mental condition.

It is not every detail of facts, which will legalize the opinions of witnesses who are not physicians. It is not enough that such witnesses have had a mere passing acquaintance, or brief occasional interviews, on general or indifferent subjects, with the one whose sanity is in question. The acquaintance should be of an intimate character—one which will enable the witness to affirm, with some confidence, that he has a knowledge of the intellectual workings and mental *status* of the party about whom he testifies; and even when this is the case, if the facts and circumstances in proof be merely indifferent or commonplace, such as are frequently witnessed in persons of similar pursuits and intelligence, the opinion of a witness based thereon, that the party was insane, should exert but little (if any) influence upon the minds of the jurors. In the cases of *Powell v. The State*, (25 Ala. 21,) and *Stubbs v. Houston*, (33 Ala. 555,) are statements of preliminary proof of acquaintance and of facts, on which we have held the opinions of non-professional witnesses were rightly admitted. In each of these cases, an intimate acquaintance was shown. So, in the case of *Florey v. Florey*, 24 Ala. We think the character of the preliminary proof in the two cases just above stated, will furnish a safe guide in questions of this kind; and that a less intimate acquaintance than deposed to by the first witness brought to our notice in the report of the case of *Powell v. The State*, should not be ruled sufficient to let in the opinions of non-professional witnesses.—*Norris v. The State*, 16 Ala. 776.

Under this rule, we hold, that the following witnesses laid a proper predicate for the introduction of their opinions to the jury—viz., Geo. McD. Patterson, Daniel McDearnid, Malcolm McMillan, and John B. Brown. The

record does not contain enough to show that the opinions of the following witnesses were properly received: Wayman Adair, A. D. Levi, and James H. Joiner. Thomas Smith does not sufficiently express a knowledge of Mr. Carmichael to legalize his opinion as to his sanity; but possibly, on another examination, the preliminary proof may be more full.

[5-6.] The following portions of the evidence, which were admitted against objection, should have been excluded:

The question to the witness Patterson, "whether or not Daniel Carmichael controlled defendant and his business?"

The question to McDearmid—"Is he not going down hill generally?"

The answer of the witness McMillan, as to what Daniel Carmichael told him;

The question to witness Joiner—"What was the defendant's appearance? was it that of a man of sound or unsound mind?" Also, the evidence of this witness, as to "the impression that the defendant made on his mind?"

The question to the witness Munroe—"Did not Daniel Carmichael enjoin upon you to go with defendant, and see that he executed the process properly?"

The testimony of the witness Malcolm McMillan, that "his mind is sound, so far as I am able to judge from my observations, transactions and acquaintance with him," seems to have been expressed with scrupulous propriety, and should have been received.

Dr. Taylor should have been allowed to express his opinion as to the soundness or unsoundness of Mr. Carmichael's mind; and should also have been allowed to state whether he had discovered any evidence of unsoundness of mind in Mr. Carmichael.—*Thomas v. DeGraffenreid*, 17 Ala. 602; *Nelson v. Iverson*, 24 Ala. 9.

The character of the questions, on cross-examination, to the witnesses Brown and Robinson, was objectionable, if the purpose of that examination was simply to bring out the facts. If the witnesses had betrayed bias, partiality or corruption, we will lay down no rule for cross-

examination. That must be, in a great degree, left to the discretion of the presiding judge.

Several of the rulings of the probate court in the final charge, not hereinabove noticed, are obnoxious to criticism; but we will not comment on them further.

Judgment of the probate court reversed, and cause remanded.

ROBINSON'S ADMR'S vs. ALLISON.

[ACTION ON ACCOUNT FOR WORK AND LABOR DONE.]

1. *Bill of particulars; sufficiency of, and admissibility of evidence under.*—In an action on an account for work and labor done, plaintiff's bill of particulars (Code, § 2233) containing an item for "work done on granary"; and the evidence showing that the granary had a shed on each side, one of which contained a threshing-machine, "the machinery consisting of a shaft and cog-wheels to move it, which were made fast to the building, like the running gear of a gin," and which were put up by plaintiff at the same time with the granary,—*held*, that under the liberal rules which govern the construction of bills of particulars, and in the absence of a special showing that the evidence operated a surprise, there was no error in the admission of evidence showing the work performed by plaintiff in putting up said machinery, and the value thereof.
2. *Error without injury in admission of evidence for wrong purpose.*—The admission of legal evidence, for an illegal purpose, is not a reversible error: it is the duty of the party to limit its effect by asking an appropriate charge to the jury.
- [2.] *Rebutting evidence of indebtedness outside of demand sued on.*—Defendants having adduced evidence, under the plea of payment, showing sundry payments made by their intestate to plaintiff during the period covered by the account sued on; and there being no evidence that the intestate had directed the application of these payments to any particular debt, or that plaintiff had made any application,—it is competent for the plaintiff to prove, in rebuttal, that the intestate owed him other debts, to which these payments might be applied by himself or the court.
3. *Application of payments.*—If a debtor owes two distinct demands, both over-due, and makes a general payment, without giving any

directions as to its application, the law will apply it, in the absence of a specific application by the creditor, to that demand which, though not barred at the time the payment was made, has since become barred by the statute of limitations, or of non-claim. (STONE, J., *dissenting*.)

4. *Practice in allowing jury to use memoranda prepared by counsel.*—The practice of permitting the jury, on their retirement, to take with them memoranda prepared and used by counsel on the trial, should not be encouraged; but, where it appears that the memorandum simply “contained and referred to the various items of debit and credit contained in the accounts before the jury,” and that the court specially instructed the jury, “that it was not to be regarded by them as evidence, and that they could not look to it for any purpose, except to aid them in referring to the various items of the accounts before them,”—the appellate court will not reverse on account of its admission.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. S. D. HALE.

THIS action was brought by Samuel H. Allison, against the administrators of William Robinson, deceased, and was commenced on the 30th July, 1856. The complaint contained a count on an open account, for work and labor done by plaintiff for defendants' intestate during the ten years between 1842 and 1852; a count on a stated account; and a count for money paid, and for work and labor done. The defendants pleaded the general issue, payment, the statutes of limitations of three and six years, the statute of non-claim, and set-off; and issue was joined on all these pleas. The defendants having required “a list of the items composing the account sued on,” (Code, § 2233,) the plaintiff furnished them with a copy thereof, which is made an exhibit to the bill of exceptions, and which contained an item for “work done on granary, \$135.” “In the course of the examination, plaintiff proved, that the granary had a shed on each side, in one of which was a threshing-machine, which was worked by horse-power; the machinery consisting of a shaft and cog-wheels to move it, which were made fast to the building, like the running-gear of a gin. He also proved the value of the machinery, and that it was put up by him, for the defendants' intestate. The witness said, that the machinery

was part of the granary; but, on cross-examination, stated, that a granary was a place to hold grain—that a threshing-machine, or machinery, did not enter into his idea of a granary; and that he called it a part of the granary in this case, because it was in the granary, and made part of it, and was put up by plaintiff at the same time. There was no evidence as to when the threshing-machine or its running-gear was put in the granary. The defendants objected to the admission of the evidence, showing that plaintiff put up said machinery for said intestate, and its value, on the ground that a charge for such work was not embraced in said list of items, and that they were thereby surprised. The court held the evidence admissible under the item relating to the granary, and overruled the objection; to which the defendants excepted."

The plaintiff then offered in evidence the deposition of one John W. O'Neal, who testified to a conversation which had occurred between himself and the defendants' intestate, in the summer of 1852, a few days before said intestate's death; which conversation is thus stated in the witness' answer to the 4th direct interrogatory: "Mr. Robinson met me on the street one day, in Huntsville, and said, that he understood I had a negro woman and girl whom I wished to sell. I told him that I had. He then said, that he would call and examine them; and did come to my house, either that day or the next, and examined the negroes, and talked about the price. I told him, that I would take \$1400 for them. *He stated to me in this conversation, that he wanted these negroes for Mr. and Mrs. Allison; that he had taken some negroes belonging to them, by request, to sell, and had sold them, or taken them himself, I am not positive which; that he was indebted to them for the negroes, (a woman, and, I think, one or two children,) and if my negroes would suit them, we would consider them sold; that he would send Mr. Allison to see them, and that he was bound to replace the negroes which he had of them.*" To the italicized portion of this answer the defendants objected, on the following grounds: "that it was illegal and inadmissible; that it tended to show an indebtedness not embraced in the list of items, and not admissible under any

count of the complaint; that if it showed any liability at all, it showed a contract to buy negroes, and not to pay money; that if it showed any liability at all on the contract, either in money or negroes, it was to the plaintiff and his wife, and not to the plaintiff alone; that it did not show any breach of the intestate's contract, whether made with the plaintiff, or with him and his wife; and that plaintiff had not offered, and did not propose to offer, any evidence of a demand, or other evidence to remove its *prima-facie* inadmissibility." "The plaintiff argued, that it was an admission of indebtedness for negroes, in the sum of \$1400; that the plaintiff could recover one-half of that sum; and that the admission was admissible under the count on an account stated. The court overruled the defendants' objection, and admitted the evidence; to which they excepted."

"There was evidence on the part of the defendants, tending to show payments by their intestate to plaintiff; but there was no evidence, tending to show that said intestate had directed the application of these payments to any particular debt, nor that plaintiff had done so. The defendants insisted before the jury, that some of their intestate's indebtedness to plaintiff, which the evidence tended to show, had not been presented to them, and was, therefore, barred under the plea of the statute of non-claim. The court left it to the jury to say, from the evidence, what claims had been presented in time; and charged the jury, that the plaintiff could not recover for any claim which had not been presented. The court also charged the jury, at the request of the plaintiff, that if there were debts due from Allison to Robinson which were barred by the statute of non-claim, and also debts which were not barred, and Robinson made payments while said debts were due, without directing the application of such payments,—then the jury would consider the debts not presented in estimating Robinson's payments. The court further charged the jury, at the request of the plaintiff, that if the defendants' intestate owed debts to the plaintiff which were not presented, and debts which were presented, and made payments to plaintiff,

without directing their application, and there was no evidence of any application by the plaintiff,—then the jury might apply such payments to the debts not presented, if they thought proper to do so; provided such debts were due and owing at the time of said payments. To each of these charges the defendants excepted, and requested the court to instruct the jury, that they could not apply the payments made by said intestate to any debts due the plaintiff, unless they found the debts to be then due at the time of payment; which charge the court gave.

“After the court had charged the jury, and when the papers in the cause were about being handed to the jury, the plaintiff's counsel proposed to hand them a memorandum in writing, made by himself, and used by him during the trial, which contained and referred to the various items of debit and credit contained in the accounts before the jury. To this the defendants objected, but the court overruled their objection, and permitted the jury to take said memorandum with them; charging them specially in reference to it, that it was not to be regarded by them as evidence, and that they could not look to it for any purpose, except to aid them in referring to the various items of the different accounts before them; that they might use said memorandum for this purpose, if they thought proper, but for no other. To this also the defendants excepted.”

The rulings of the court to which exceptions were reserved, are now assigned as error.

E. J. JONES, for appellants.

R. C. BRICKELL, *contra*.

R. W. WALKER, J.—1. In response to the defendant's demand for “the list of items composing the account,” which answers to the common-law bill of particulars, (*Pryor v. Johnson*, 32 Ala. 27,) the plaintiff furnished an account, containing an item for “work done on granary, \$135.” The proof was, that the granary on which the plaintiff had worked had a shed on each side, in one of

which was a threshing-machine, "the machinery consisting of a shaft and cog-wheels to move it, which was made fast to the building, like the running-gear of a gin," and which were put up by the plaintiff at the same time with the granary. The defendant objected to evidence that the plaintiff put up "said machinery," (meaning, as we suppose, the stationary machinery, the shaft and wheel, by which the threshing-machine was impelled,) and of the value of the work, upon the ground that a charge for the same was not embraced in the list of items.

It would seem from the evidence, that the wheel and shaft were fixtures, and, therefore, part of this particular granary, (*McDaniel v. Moody*, 3 St. 314; *Hancock v. Jordan*, 7 Ala. 450;) and according to the liberal rules which govern in the construction of bills of particulars, the admission of the evidence was not an error for which we should reverse the judgment. In respect to variance, bills of particulars are regarded with a spirit very favorable to letting in every claim under them which can be covered by any possible construction of their language. 3 Phill. Ev. (C. & H. notes,) 3d ed. p. 637; *Smith v. Hicks*, 5 Wend. 48; *Benson v. Brown*, 10 Wend. 248. It has been said, that the test of the sufficiency of a bill of particulars is, "whether it is calculated to mislead a party who knows something about the matter;" and if not so calculated, it shall be deemed sufficient, unless upon affidavit, or other satisfactory evidence, that it has operated a surprise upon the adverse party.—*Harris v. Montgomery*, 5 Eng. L. & Eq. 442; *Tillon v. Hutchinson*, 3 Green's Law, 178. Supposing a party to know something of the circumstances under which the machinery in question was erected, and of its connection with the room used as a granary, it is far from clear that he would be surprised by the evidence which was objected to. There was no special showing that the evidence was a surprise to the defendants; and in the absence of affidavits, or other evidence to that effect, we are not prepared to say that the court erred in admitting it.—See, further, *Power v. Butcher*, 10 Barn. & Cress. 329.

2. If the evidence of the witness O'Neal became rel-

evant for any purpose, at any stage of the cause, its admission is not an error for which we would reverse, although at the time when, and for the purpose for which it was offered, it may have been irrelevant.—*King v. Pope*, 28 Ala. 601; *Goldsmith v. Picard*, 27 Ala. 151; *Johnson v. State*, 29 Ala. 68. The bill of exceptions shows, that there was evidence on the part of the defendants, tending to prove payments by the intestate to the plaintiff; but there was no evidence that the intestate had directed the application of the payments to any particular debts, or that the plaintiff had made any application of them. Under these circumstances, the duty of determinining how the payments should be applied, devolved upon the court. It was, therefore, competent for the plaintiff to prove, that there were other debts to which these general payments might be applied, either by himself or by the court, besides those sued for and embraced in the bill of particulars.—*Brown v. Denison*, 2 Wend. 593; *Ross v. Pearson*, 21 Ala. 476. The evidence of the witness did tend to establish such a debt; and as it was admissible for the purpose we have indicated, its admission for another and an improper purpose is not a reversible error. The defendants could have limited its effect, by asking the necessary instructions. *Goldsmith v. Picard*, 27 Ala. 151; *Cook & Scott v. Parham*, 24 Ala. 21.

3. Where neither party has applied the payment, but it is left to be appropriated by law, the general principle adopted by the American courts is, to apply it according to the intrinsic justice and equity of the case.—*Cremer v. Higgerson*, 1 Mason, 338; *Callahan v. Bozeman*, 21 Ala. 449; *United Stats v. Wardwell*, 5 Mason, 85; *Seymour v. Van Slyck*, 8 Wend. 403; *Smith v. Lloyd*, 11 Leigh, 517; *Stamford Bk. v. Benedict*, 15 Conn. 442; 2 Greenl. Ev. §§ 529, 533. It is upon this principle that the courts apply a payment to the debt which is most precarious. *Field v. Holland*, 6 Cranch, 8; *Moss v. Adams*, 4 Ired. Eq. 42; *Blanton v. Rice*, 5 Monroe, 253; 2 Greenl. Ev. § 533; 1 Am. Lead. Cases, 295. Where, at the time the payment is made, the debtor owes the creditor two de-

mands, both then due; and afterwards, but before the appropriation is made by the court, one of these demands is barred by the statute of limitation, or of non-claim, justice between the parties would seem to require, that the payment should be applied to the debt thus barred. See *Hamner v. Rochester*, 2 J. J. Marsh. 144. Indeed, the failure of the debtor to present one of his demands, as required by the statute of non-claim, when coupled with his presentation of, and commencement of suit upon the other, might, perhaps, justify a court in presuming an application of the payment by the creditor to the debt not presented. It is clear from what we have said, that there was no error in the charges given, *of which the defendants can complain.*

4. The practice of permitting the jury to take out with them memoranda prepared and used by counsel on the trial, is one which, we think, should not be encouraged by the circuit court. But the paper which was suffered to go to the jury in this case appears to have been a simple memorandum, referring to the various items of debit and credit contained in the accounts before the jury, and the court specially charged the jury, that the memorandum was not to be regarded by them as evidence, and that they could not look to it for any purpose, except to aid them in referring to the various items in the different accounts before them. We do not see how the use of the memorandum by the jury, under these restrictions, could have injured the defendants; and we will not reverse for such a cause.

Judgment affirmed.

STONE, J., dissents on the 3d point.

BOYD vs. HARRISON.

[ACTION BY WIDOW, AGAINST HUSBAND'S ADMINISTRATOR, TO RECOVER RENTS OF DWELLING-HOUSE.]

1. *What law governs right of dower.*—The widow's right of dower is governed by the law which was of force at the time of the husband's death, and not by that which was in existence at the time of the marriage, or of the husband's acquisition of the land.
2. *When widow is entitled to dower.*—Under the Code, (§ 1354,) the widow is not entitled to dower in lands which were bought by her husband at an administrator's sale, but of which he never received any conveyance, not having made full payment of the purchase-money at the time of his death.
3. *Estoppel against administrator from denying intestate's seizin.*—In an action by the widow, against the husband's administrator, to recover the rents of the dwelling-house in which the husband most usually resided next before his death, (Code, § 1359,) the defendant is not estopped from denying that his intestate had such title to the premises as is necessary to support the action.
4. *Estoppel by record.*—In proceedings before the probate court, on the petition of a widow, for the allotment of her dower, the mere fact that the husband's administrator is named as a defendant in the marginal statement of the parties' names, and a decree for costs rendered against him, is not sufficient to show that he was a party; consequently, the record is not admissible evidence against him, in a subsequent action by the widow for the recovery of rents, and does not estop him from denying the husband's seizin of the lands.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Mrs. Lucy A. Harrison, the widow of Reuben Harrison, deceased, against Wm. E. Boyd, who was the administrator *de bonis non* of said Reuben Harrison, to recover the rents of the dwelling-house and plantation on which the decedent most usually resided next before his death, from the 1st January, 1853, to the 1st March, 1857; and was commenced on the 9th July, 1858, immediately after the decision of the former case between these parties.—*Ante*, p. 203. The

defendant pleaded, in short by consent—1st, non assumption; 2d, payment; 3d, set-off; and, 4th, a special plea, averring that the intestate, at the time of his death, “was not in possession of any real estate in which the plaintiff was entitled to dower.” The plaintiff replied the statute of limitation of three years to the 3d plea, and took issue on the others.

The material facts of the case are these: The plaintiff and Reuben Harrison were married in the year 1846. The lands of which rent is claimed in this suit, and which constituted the homestead plantation of said Reuben Harrison at the time of his death, were purchased by him on the 20th February, 1849, at a sale made by the administrator of Richard B. Harrison, deceased, under an order of the probate court; his note, with surety, being given for the purchase-money. The sale was reported to the probate court, and was confirmed by that court at its June term, 1849; and it was at the same time ordered, “that the administrator make title to the purchasers, &c.” Reuben Harrison died on the 29th May, 1854, without having paid any portion of the purchase-money, which was afterwards paid by the defendant as his administrator. There was no evidence that a conveyance of the land was ever executed under the order of the probate court: on the contrary, the administrator *de bonis non*, by whom the note for the purchase-money was collected, testified, “that he had never executed any titles for said lands, and did not know that any titles had been made by the administrator in chief.” After the death of Reuben Harrison, the plaintiff continued to reside in the dwelling-house on the plantation, and was supplied with all the necessaries for herself and family that were raised on the plantation. The lands were cultivated, during the years 1855 and 1856, by the slaves belonging to the estate; the crops were received by the defendant, and the proceeds were applied by him in payment of the debts of the estate.

The plaintiff offered in evidence a record of the probate court, showing the proceedings had on her petition for dower. The petition was filed on the 22d December,

1856, and alleged the husband's seizin of the lands at the time of his death. On the same day, the court ordered a writ of dower to be issued to the sheriff, returnable on the 2d Monday in February then next. The decree of the court, which is without date, sets out the report of the commissioners, and confirms it; directs the sheriff to put the petitioner in possession of the lands allotted to her, and orders the administrator to pay the costs of the proceeding out of the estate. The case is entitled in the margin, "Lucy A. Harrison, widow, v. William E. Boyd, adm'r of Reuben Harrison, deceased;" but the record does not otherwise show that the administrator was a party to the proceeding. The defendant objected to the admission of the record as evidence, and reserved an exception to the overruling of his objection.

"There being no conflict in the evidence, the defendant asked the court to instruct the jury, that if they believed the evidence, they must find for the defendant." The court refused to give this charge, and then instructed the jury, "that if they believed from the evidence that Reuben Harrison was in possession of the plantation at the time of his death, cultivating and claiming the same as his own, and there was no other evidence as to what title he had, it would be presumed from these facts that he had such a title as would entitle his widow to dower therein." This charge, together with the refusal of the charge asked, and the rulings of the court on the evidence, to all of which exceptions were reserved by the defendant, is now assigned as error.

D. S. TROY, for appellant.—1. In the former case between these same parties, and on the same facts that are presented by the present record, this court decided, that the plaintiff was not entitled to recover rents, unless she was entitled to dower; and that she was not entitled to dower under the Code.—See the former opinion. As the Code was of force at the time of the husband's death, its provisions must govern the plaintiff's right to dower. *Reynolds v. Reynolds*, 24 Wendell, 193; *Saul v. Credi-*

tors, 5 Martin's (La.) R. 569; Harrison v. Harrison, 19 Ala. 499; Story on Conflict of Laws, §§ 280, 281.

2. If the plaintiff's right to dower is to be determined by the former law, her claim is equally unfounded, as her husband did not have the legal title to the land, and had not paid the purchase-money.—Authorities collected in Reavis' Digest, 459; Shepherd's Digest, 142.

3. The defendant was no party to the proceedings in the probate court for the allotment of the plaintiff's dower; consequently, he was not thereby estopped, nor was the record admissible evidence against him.—Shepherd's Digest, 134, 576.

J. D. F. WILLIAMS, with D. W. BAINE, *contra*.—1. The plaintiff's rights are to be determined by the act of 1812, which was of force at the time of the marriage. Marriage is a valuable consideration; and one of the conditions of the marriage was, that she should be dowable of all lands possessed by her husband at that time, or afterwards acquired during the coverture; and that was a vested right, which is not affected by the Code.—1 Bright on H. & W. 324-5; Harrison v. Harrison, 19 Ala. 508.

2. After the husband's purchase of the lands at administrator's sale, his compliance with the terms of the sale, the confirmation of the sale by the probate court, and its order to the administrator to make titles to him, the heirs-at-law were seized in trust for his use, and his widow was entitled to dower.—Clay's Digest, 157, § 36; *ib.* 229, §§ 45, 46. On these facts, Reuben Harrison might have compelled a conveyance by the administrator in equity; and, as the vendor's lien was destroyed by the personal security given for the purchase-money, the heirs could not have recovered the possession from him, because he could have enjoined them in equity.—Foster v. Athenæum, 3 Ala. 302; Gilman v. Brown, 4 Wheaton, 290.

3. On the same facts, the plaintiff was equally dowable under the second subdivision of section 1854 of the Code. Moreover, since the administrator was authorized and required, both by the statute and the order of the court, to make a deed to the purchaser, it must be presumed

that he did his duty; and, as the plaintiff was not the proper custodian of the deed, it was not necessary that she should either produce it, or account for its absence. The existence of the deed being presumed, the plaintiff's right to dower is clear under the first subdivision of said section 1354.

4. The defendant, being the administrator of Reuben Harrison, will not be permitted to deny or dispute the seizin of his intestate.—Hitchcock v. Harrington, 6 Johns. 293; Collins v. Torry, 7 *ib.* 281; Hitchcock v. Carpenter, 9 *ib.* 344; Norwood v. Marrow, 3 Dev. & Bat. 448; Torrence v. Carbry, 27 Miss. 697; Randolph v. Doss, 3 How. (Miss.) 214.

5. The plaintiff's right to dower in these lands was already adjudicated by the probate court; and, as the defendant was a party to that proceeding, he was estopped by the decree.—Chamberlain v. Gaillard, 26 Ala. 504.

A. J. WALKER, C. J.—The law existing at the husband's death must govern the question of the widow's right to dower. It is competent for the legislature to modify the law on the subject of dower, in a manner unfavorably affecting the wife, after her marriage, and after the acquisition by the husband of the land in which dower is claimed. In doing so, the legislature would neither impair the obligation of a contract, nor deprive the wife of any right of property vested in her.

Dower by the common law, which, of the five species of dower known in the old English law, is the only one recognized in this country, does not result from a contract. It is given by the law to the widow, "for the sustenance of herself, and the nurture and education of her children;" and is called in the old law, "*dos mulieris secundum consuetudinem anglicanum*."—1 Thomas' Coke, 655. It is an estate, which "arises solely by operation of law, and not by force of any contract, express or implied, between the parties; it is the silent effect of the relation entered into by them; not as in itself incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive

institution of the municipal law."—Park on Dower, 5, 130, *et seq.* The right of dower not existing by virtue of contract, the obligation of a contract is not impaired by the modification of the law which governs it. Indeed, marriage itself is not regarded as a contract, within the meaning of that article of the constitution which guards the obligation of contracts against legislative interference. It may be, that the alienee of the husband could not be affected by a statute, which, after his purchase, gave dower in the lands conveyed, or enlarged the dower. *McCaferty v. McCaferty*, 8 Blackf. 218; *Given v. Marr*, 27 Maine, 212. But we can draw no analogy from such a case to govern this; for, in that case, the alienee takes under a contract which might be impaired, while dower is not the result of contract.

The wife has no property in the husband's lands, pending the coverture. Three things are necessary to the perfection of the right of dower. These three things are, marriage, seizin, and the husband's death. Before the husband's death, the wife has not a contingent right. Her attitude is that of a party in whose favor two pre-requisites to the existence of a right have occurred, and a remaining one is wanting. She has a mere expectancy, resting upon the probability that the remaining requisite may, at some future time, come into existence. The expectancy being clothed with the quality that no contract can defeat it without her assent, it is an incumbrance upon the husband's title. This quality, attached by the subsisting law, has given rise to some looseness of expression in describing the wife's attitude in reference to the lands of a living husband, which is calculated to lead to the erroneous conclusion, that the wife has, before her husband's death, a title.—Park on Dower, 237. If the wife has a right of property, depending upon the contingency of her surviving, as some loose expressions would seem to indicate, then she would have a contingent remainder in all her husband's lands, and would be a necessary party in all suits pertaining to the husband's title. Such a proposition has no sanction in the law; but, on the contrary,

it is laid down that the estate of a dowress is a mere continuation of the husband's estate.

The question which we are considering, has been the subject of adjudication several times in this country; and it has been decided, in every case, that the wife has not, during her husband's lifetime, an interest in his lands, which is beyond the control of legislation. We subjoin a list of the cases.—*Moore v. Mayor, &c.*, 4 Selden, 110; *Reynolds v. Reynolds*, 24 Wend. 193; *Moore v. Mayor, &c.*, 4 Sandf. Sup. Ct. 456; *Leavins v. Sleator*, 2 Iowa, 604; also, *Sleight v. Read*, 18 Barb. 159; *Blood v. Humphreys*, 17 *ib.* 660. In the case of *Reynolds v. Reynolds*, Judge Bronson, delivering the opinion of the court, said: "While the husband lives, the wife has no right, interest, or estate in the land. She has nothing but a mere capacity to take in the event of her surviving her husband—she is dowable. It is not until she becomes a widow that she is entitled to dower." The authorities and arguments adduced fully sustain his position, and we refer to that opinion for an able discussion of the entire subject.

[2.] The complainant's right of dower must be governed by the Code. Under that law, upon the facts before us, she is not entitled to dower, as was decided in a case between the same parties, at a former term.

[3.] The administrator in this case is not estopped from denying that the estate of his intestate was of such character as to entitle the widow to dower. The point is so settled in *Edmondson v. Montague*, 14 Ala. 370.

[4.] The decree of the probate court, allotting dower to the plaintiff, was not admissible evidence in this case. The defendant, notwithstanding a decree for costs was rendered against him, was not a party to the proceeding, and can not be estopped by it.

Judgment reversed, and cause remanded.

DAVIS *vs.* ORME.

[STATUTORY ACTION TO RECOVER MONEY LOST ON HORSE-RACE.]

1. *Admissibility of hearsay to prove marriage.*—In a statutory action for the use of the wife of a person who has bet and lost money on a horse-race, (Code § 1563,) general reputation cannot be received, to prove that the beneficiary of the suit is the wife of the loser.
2. *Admissibility of husband's declarations as evidence against wife.*—In such action, the declarations of the husband, made after the bet was concluded, but before the race was run, to the effect that he had no interest in the wager, are competent evidence against the plaintiff.
3. *When statutory action lies.*—An action lies for the use of the wife, to recover money bet and lost by her husband on a horse-race, (Code, § 1563,) notwithstanding the fact that her husband's interest in the wager was purposely concealed from the defendant, because of his known unwillingness to make a bet with the husband, or on a race in which the latter was interested.
4. *Parties to such action.*—Where several persons are interested in money lost on a horse-race, an action may be brought for the use of the wife of any one of them, without joining the others, to recover her husband's portion of the money.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by Daniel Davis, suing for the use of Mrs. Julian Davis, wife of James Davis, against Thomas J. Orme, to recover the sum of \$400, alleged to have been won by the defendant from said James Davis, on the 20th August, 1857, as a wager on a horse-race; and was commenced on the 24th June, 1858. The defendant pleaded, "that he was never indebted in manner and form as plaintiff has complained against him." The rulings of the court on the trial are thus stated in the bill of exceptions:

"The plaintiff introduced evidence tending to show that, on the 20th August, 1857, a horse-race was run, near Hayneville in said county, between two horses, one of which belonged to the defendant, and the other to James

Davis; that the defendant and one Jones bet \$400 on said race; that the defendant's horse won the race; that some little dispute afterwards arising about paying over the money to the defendant, he and Jones finally agreed, as a compromise and settlement of the dispute, that they would draw another \$100 bet which they had made on another race, that the \$400 won by the defendant should be paid over to him, and that he should pay \$50 to Jones for the keeping of Davis' horse; and that this was accordingly done, and the money paid over to the defendant, on the day the race was run. The proof further tended to show, that the defendant and said James Davis had had a previous difficulty about a horse-race, and the defendant was unwilling to make any more bets on horse-racing with said Davis, or in any race in which said Davis had any interest; that said Davis, about one month before said race was run, handed \$400 to one Robinson, and requested him to hand it to said Jones, for the purpose of making a bet on his horse against the defendant's; that Robinson handed said money to Jones, who used it, as above stated, in making said bet with the defendant,—Jones and Robinson each taking an interest of one hundred dollars in said bet, and Davis being interested to the amount of two hundred dollars; that the defendant inquired of said Jones and Robinson, at the time the bet was made and the money put up, whether said Davis had any interest in the race or bet,—saying, that he would have nothing to do with it if Davis was interested in it; that Robinson and Jones both assured him that the money belonged to Jones, and that Davis had no interest in it; that the defendant made the bet upon this assurance, and would not have made it if he had known that Davis was interested in the race; that Davis and Jones both knew the defendant's unwillingness to make a bet in which Davis was interested; that Davis put the money into Jones' hands, with the understanding that he should make the bet with the defendant in his own name, and should deny the interest of Davis in the same, for the purpose of inducing the defendant to make the bet; and there was no evidence that the defendant had any notice, until this suit was

brought, that the money bet by Jones, or any part thereof, belonged to Davis.

"The plaintiff proved, that James Davis now lived, and had lived for more than ten years, in Dallas county, Alabama; that there was a family of children in the house where he lived, and a lady who, on one occasion, was introduced by said Davis as Mrs. Davis; and that this lady, with the children, dined at the table with said James Davis and his guest. The plaintiff proved, by a witness who had resided in the neighborhood for the last ten years, that he had never known or heard any thing showing that this lady was not the wife of said Davis. Plaintiff then asked said witness, what was the common reputation about her being his wife. The defendant objected to this question, and the court sustained the objection; to which the plaintiff excepted. The court allowed the witness to be asked, what was the common reputation in the neighborhood on this point.

"The defendant proposed to prove, by a witness at whose house Davis kept his horse for several weeks before the race, that while Davis was keeping his horse with him, and after the bet had been made and the money staked, Davis said that he had no interest in the race. The plaintiff objected to this evidence, and, his objection being overruled, excepted. The witness testified, that Davis did say, during the time aforesaid, that he had no interest in the race.

"The court charged the jury, that if they believed from the evidence that Davis put the money in controversy into the hands of Jones, to make a bet upon a horse-race with the defendant, when he and Jones knew the defendant would not make the bet if he knew that Davis had an interest in it, and with the purpose and intention that Jones should represent the money to be his own, and thereby induce the defendant to make a bet which he would not make if he knew that Davis was interested in it: and that this money was bet by Jones with the defendant on a horse-race; and that both Jones and Davis denied that Davis had any interest in the bet; and that Jones represented to the defendant that the money was

his, and made the bet in his own name; and that Davis was not known to the defendant in the bet; and that the defendant believed, and was assured by Jones, that Davis had no interest in the bet, and would not have made the bet if he had known that Davis was interested in it,—then the plaintiff could not recover, although Davis was in fact a party interested in the bet.”

The plaintiff excepted to this charge, and he now assigns it as error, together with the rulings of the court on the evidence.

D. W. BAINE, with J. D. F. WILLIAMS, for appellant.

1. James Davis was not a party to the suit, nor in privity with any party; nor was he in any sense the transferrer of the cause of action. The wife's right of action is derived directly through and from the statute, and not from her husband; and there is no principle of law which justifies the admission of his declarations to defeat her action.

2. The authorities do not confine the reputation, which is received to prove marriage, to the immediate neighborhood.—1 Greenl. Ev. § 128.

3. The charge of the court involves a misconception of the object and policy of the statute on which the action was founded. The statute was manifestly intended to suppress the evil practice of betting, and to prevent an improvident husband from gambling away his estate; an object which would be utterly defeated, if the husband can avoid the statute by merely employing the agency of another in carrying out his purpose. The husband's fraud cannot estop the wife, nor defeat her statutory rights. Nor can the defendant claim any benefit from the deception practiced on him, since he engaged in an illegal transaction at his peril.—Manning v. Manning, 8 Ala. 142; Givens v. Rogers, 11 Ala. 543. It is well settled, that where one contracts with an agent, in ignorance of his agency, the principal may nevertheless maintain an action. Story on Agency, § 420, and cases cited. Here, the plaintiff's rights, under the statute, are paramount to the rights of the principal, agent, or winner.

WATTS, JUDGE & JACKSON, *contra*.—1. That the declarations of James Davis, in disparagement of his own title, were competent evidence, see *Brown v. Foster*, 4 Ala. 284; *Chisolm v. Newton & Wiley*, 1 Ala. 371; *Head v. Shaver*, 9 Ala. 791.

2. In allowing evidence of common reputation in the neighborhood, to prove the marriage of James and Julian Davis, the court went as far as the authorities will allow.

3. Section 1563 of the Code, on which the action is founded, creates a right in the nature of a penalty; and the party who sues under it, must conform to its provisions. Davis neither bet any money with Orme, nor paid any money to him lost on a horse-race: on the contrary, Jones made the bet, and paid the money, and Orme knew nothing of Davis' interest in the money until the commencement of this suit. If Orme had lost the race, he might have sued Jones for the money, but not Davis; and there must be some mutuality in the construction of the statute.

4. If Davis can recover at all, Jones and Robinson ought to have joined with him, because they were all jointly interested in the wager.

STONE, J.—In refusing to receive evidence of general reputation that Julian Davis was the wife of James Davis, the circuit court did not err. That court went quite as far in receiving evidence on this point as the law allows. 1 Greenl. Ev. § 107; Shep. Dig. 561, §§ 101, 103.

[2.] Neither did the court err in receiving evidence of the admissions of James Davis, made after the terms of the bet were agreed on, and before the race was decided, that he had no interest in the bet. Mrs. Davis' right to recover depends on the establishment by her of the fact, that James Davis, her husband, had lost, and Mr. Orme had won, money which he, Orme, received. To make out her claim, she must show that, before and up to the time of the race, Mr. Davis had money, which, after the race, went to Mr. Orme. Claiming title through him, it necessarily follows, that whatever he said in disparagement of his title, pending the time during which she must and

does assert he had title, is legal evidence against her. *Thomas v. Degraffenreid*, 17 Ala. 602; *Head v. Shaver*, 9 Ala. 791; *Shep. Dig.* 583, § 1.

[3.] The present action was brought under the last of the following two sections of the Code: "§ 1562. All contracts, founded in whole or in part on a gambling consideration, are void; and any person who has paid any money, or delivered any thing of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within six months from the time of such payment or delivery." "§ 1563. Any other person may also recover the amount of such money, thing, or its value, by action commenced within twelve months after the payment or delivery thereof, for the use of the wife; or, if no wife, the child or children; and if no child or children, the next of kin of the loser."

It is contended for appellee, and the circuit court so ruled, that inasmuch as the wager in this case was made by Mr. Jones, assuming to act in the premises for himself; that Mr. Orme refused to engage in the race, or make the bet with Davis; and that Orme, when the race was agreed on, was informed and believed he was dealing with Jones, and not with Davis,—then, although the money wagered and lost may have belonged to Mr. Davis, and although the plaintiff Julian may be the wife of said James Davis, still this action can not be maintained.

Section 1562 of the Code declares all contracts, founded in whole or in part on a gambling consideration, to be void. The wager, while it remained a wager, and up to the time when the money was, after the race, delivered to Orme, was wholly void; and \$200 of the money wagered, on the hypothesis assumed in the charge, was, for all purposes, the money of Mr. Davis, subject to his control and direction, and liable to be recovered by him in a suit therefor. Mr. Jones, as to the \$200, was but the agent of Mr. Davis, subject to his varying lawful directions, no matter how frequently given; and hence, Mr. Jones, in no sense, became the owner of the money. If Mr. Jones had deposited that money in the hands of a third person, or, if he had casually lost the same, and it had been found

by a third person, Mr. Davis could have maintained an action for its recovery.—Houston v. Frazier, 8 Ala. 81; Hitchcock v. Lukens, 8 Por. 333; Madden v. Smith, 3 Stew. 119; White v. Wood, 15 Ala. 358; Upchurch v. Norsworthy, *ib.* 705; Wilson v. Sargeant, 12 Ala. 778; Ivey v. Phifer, 11 Ala. 535; Allen v. Booker, 2 Stew. 21; Vandyke v. The State, 24 Ala. 81.

Although Mr. Davis was not known to Mr. Orme in the making of this wager, nevertheless it was his act. *Qui facit per alium, facit per se.*—English v. The State, 35 Ala. 428.

We think the facts supposed in the charge of the court could not have the effect of defeating this action. The evident policy of section 1563 of the Code was, that the wife, children, or next of kin, of one who had improvidently lost his property at the card-table, or on the race-course, might re-possess themselves thereof. The law is a cobweb, if its purpose can be defeated by the flimsy subterfuge of having the wager made by one, with the moneys of another.

[4.] There is nothing in the argument that, inasmuch as the wager in this case was a gross sum of \$400, and it is only claimed that Mr. Davis owned \$200 of the money, therefore a separate action can not be maintained for the several interests involved.—Tankersly v. Childers, 20 Ala. 212; S. C., 23 Ala. 781; Smith v. Wiley, 22 *ib.* 396.

The judgment of the circuit court is reversed, and the cause remanded.

ST. JAMES' CHURCH vs. ARRINGTON.

[BILL IN EQUITY TO ENJOIN ERECTION OF STABLE AS NUISANCE.]

1. *When equity will enjoin probable nuisance.*—A private stable, near a church, not being necessarily a nuisance: and the probable inconvenience that may result from its use, to the congregation wor-

St. James' Church v. Arrington.

shipping in the church, not being a mischief of that vast and overwhelming character which authorizes the interference of a court of equity in advance of a trial at law,—the chancery court will not enjoin its erection, at the instance of the corporate authorities of the church, on the ground that it will be a nuisance.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed in the name of the minister, wardens and vestrymen of St. James' church in the town of Livingston, a body corporate, against Henry F. Arrington, and sought to enjoin the erection of a stable by the defendant on a lot adjoining the church. It alleged, that the defendant was erecting a stable on the south side of the church building, and in close proximity to it, containing sixteen stalls; that said stable would, "of necessity, create a nuisance, so aggravated in its character as, in the opinion of complainants, to militate materially against the welfare and usefulness of said church"; that there were three windows in the church building on the south side, which were necessary to its proper ventilation; that the deposits from the stable, which always accumulate in and about stables, would create an offensive stench during the hot season; that a south wind,—“the point of the compass from which the wind usually comes during the hot season,”—would blow an intolerably offensive odor into the church; that the defendant, in erecting his stable on that site, was actuated by “some capricious whim, or desire to molest the welfare of complainants' church”; and that the erection of the stable, on that site, would be “essentially injurious” to complainants' church. The prayer of the bill was for an injunction, and for general relief.

The chancellor sustained a demurrer to the bill, for want of equity, on the ground that “a stable is not, *per se*, a nuisance”; and his decree is now assigned as error.

T. B. WETMORE, for appellant.—The complainants are a religious institution, and complain of the injury done to the usefulness of their church. An action at law for

damages could only determine the material injury done to their property, and would be outside of, if not antagonistic to, the objects of their incorporation. The moral injury of which they complain, in having the public prevented from attending service at their church, is not the subject of an action at law, but is peculiarly within the preventive justice of the chancery court. As to nuisances which may be enjoined in chancery, see 2 Eden on Injunctions, 271-2; 4 Eng. L. & Eq. 20; 9 Geo. 425; 10 *ib.* 337; 9 Paige, 575.

T. REAVIS, *contra*.—A stable, near a church, is not necessarily a nuisance. The established rule is, that if the thing sought to be enjoined is not unavoidably, and in itself, a nuisance, but only something which may become so under certain circumstances, a court of equity will not interfere until the matter has been tried at law.—*Ripon v. Hobart*, 1 Cooper's Sel. Cases, 333; *Ray v. Lynes*, 10 Ala. 63; *Kirkman v. Handy*, 11 Humph. 406; *Simpson v. Justice*, 8 Ired. Eq. 115; *Dargan v. Waddell*, 9 Ired. L. 244; *Ingraham v. Dunnell*, 5 Metcalf, 118; *Dana v. Valentine*, *ib.* 8; *Charles River Bridge v. Warren Bridge*, 6 Pick. 376; *Hart v. Mayor*, 3 Paige, 213; *Bigelow v. Hartford Bridge*, 14 Conn. 565; *Laughlin v. President*, 6 Indiana, 223; *Van Winkle v. Curtis*, 2 Green's Ch. 422; *Pickard v. Collins*, 23 Barbour, 444; *Gwin v. Melmoth*, Freeman's (Miss.) Ch. 505; *Randolph v. Rosser*, 7 Porter, 238. The statement in the bill, that the stable will, of necessity, create a nuisance, is nothing more than the expression of an opinion.—*Coker v. Birge*, 10 Geo. 336; 9 Paige, 576. The defendant's motive has nothing to do with the case.—*Pickard v. Collins*, 23 Barbour, 444.

R. W. WALKER, J.—The jurisdiction of courts of equity, to interpose by injunction in cases of private nuisance, is of comparatively recent growth; and, though it is now well established, it must be admitted, that the control thus assumed over an individual, in the use or enjoyment of his property, is one of the extraordinary powers of the court, and should be cautiously and sparingly ex-

exercised. Both in England and the United States the courts are exceedingly unwilling to interfere, until the nuisance has been established by a trial at law. Unless the nuisance has been previously established at law, it must be "a strong and mischievous case of pressing necessity," to entitle the party to an injunction.—*Rosser v. Randolph*, 7 Porter, 245-6; *Ray v. Lynes*, 10 Ala. 64.

The general rule upon this subject is thus stated by Lord Brougham, in *Ripon v. Hobart*, (3 M. & K. 169; S. C., 1 Cooper's Sel. Cas. 333 :) "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings,—the injunction being in the meantime continued. But, where the thing sought to be restrained is not unavoidably, and in itself, noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere, until the matter has been tried at law, generally by an action, though, in particular cases, an issue may be directed for the satisfaction of the court, where an action could not be so framed as to meet the question."

The principle, that the court will not interfere in the first instance by injunction, where the matter complained of is not, *ipso facto*, a nuisance, but may or may not prove so, according to circumstances, was recognized in *Ray v. Lynes*, (10 Ala. 63,) and, as a general rule, is well established in the equity jurisprudence of the United States. *Kirkman v. Handy*, 11 Humph. 406; *Mohawk Co. v. Utica Co.*, 6 Paige, 554, 563; *Bell v. Ohio Co.*, 25 Penn. 161, 175, 182; *Dana v. Valentine*, 5 Metcalf, 8; *Ingraham v. Dunnell*, *ib.* 118; *Harrison v. Brooks*, 20 Geo. 543; *Laughlin v. President, &c.*, 6 Indiana, 223; *Gwin v. Melmoth*, Freeman's Ch. (Miss.) R. 505; *Barnes v. Calhoun*, 2 Ired. Eq. 199; *Van Winkle v. Curtis*, 2 Green's Ch. 422; 2 *Waterman's Eden on Injunctions*, note 1, 269, 273-4-5; *Adams' Eq.* 211, note 1, 217-18.

It is true that the general rule, as thus stated, must be taken subject to the qualifications declared by Lord

Brougham in the leading case: "In matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability, in cases where the mischief, should it be done, would be vast and overwhelming."—*Ripon v. Hobart*, 3 M. & K. 169; *Mohawk Co. v. Utica Co.*, 6 Paige, 563; see, also, *Hinton v. Earl of Granville*, 1 Cr. & Ph. 283, 297; *State v. Mayor*, 5 Porter, 279; *Bacon v. Jones*, 4 M. & Cr. 434; *Cory v. Norwich Co.*, 3 Hare, 593.

A private stable, near a church, does not belong to the class of erections which are unavoidably, and in themselves, nuisances. That it may become a nuisance, is no doubt true; but the question whether or not it will prove to be one, depends, in a great measure, upon its proximity to the church, the manner in which it may be built, the number of horses placed in it, and the degree of care with which it may be kept; and hence it is not susceptible of definite settlement, until the building is completed, and applied to the use for which it is designed.—*Kirkman v. Handy*, 11 Humph. 406; *Dargan v. Waddell*, 9 Ired. L. 244.

Whenever it is legally ascertained that it has become a nuisance, a court of equity will protect, by injunction, any party injured thereby. But as, in the present case, it is yet uncertain, and remains to be ascertained from future events, whether or not the erection will become a nuisance, there is no ground for an injunction arresting the further progress of the building, or its appropriation to the use intended. Admitting that there is a strong probability that inconvenience and discomfort may result from the use of the stable; yet the injury apprehended is not of that "vast and overwhelming" character, which would justify a departure from the general rule above stated, which,

as we have seen, denies an injunction in such cases, in advance of a trial at law.—Authorities *supra*; also, *De-witt v. Hays*, 2 Calif. 463; *Pickard v. Collins*, 23 Barb. S. Ct. R. 444.

Decree affirmed.

O'BANNON vs. MYERS' EXECUTORS.

[BILL IN EQUITY FOR FORECLOSURE OF MORTGAGE.]

1. *Affidavit of lost instrument*.—When a party comes into equity to obtain the benefit of an instrument properly belonging to the jurisdiction of a court of law, on the ground that it is lost, an affidavit of its loss must accompany the bill; but this rule does not apply to a bill for the foreclosure of a mortgage, given to secure the payment of a note which is alleged to be lost.
2. *Proof of note by recitals of mortgage*.—The recital of a note in a mortgage given to secure it, although it does not estop the mortgagor from denying the existence of the note as recited, is not sufficient to overcome his sworn denial of its existence in his answer to a bill in chancery.
3. *Variance*.—There can be no decree in chancery, in favor of the complainant, without a substantial correspondence between his allegations and proof.

APPEAL from the Chancery Court at Wetumpka.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the executors of Claiborne Myers, deceased, against Joseph D. O'Bannon, for the purpose of foreclosing a mortgage on a lot in the town of Prattville, which purported to have been given to secure the payment of a note for \$600, executed by said O'Bannon, on the 20th January, 1852, and payable to said Claiborne Myers, or bearer, on the 1st January, 1853. The bill alleged, "that the note has been lost or destroyed, as complainants believe, and has not been paid or other-

wise discharged;" and was sworn to, by both of the complainants, in the usual form. The defendant answered, on oath, denying his indebtedness to the testator, and the existence of the note described in the mortgage; alleging that the mortgage was given and intended to secure the testator against his liability, as surety for the defendant, on two notes to one Spigner, which together amounted to about \$500, and, by mistake of the attorney who wrote it, misdescribed the demand intended to be secured; and praying that the answer might stand as a cross bill for the reformation and satisfaction of the mortgage. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and dismissed the cross bill, at the costs of the defendant; and his decree is now assigned as error.

N. S. GRAHAM, for appellant.

ELMORE & YANCEY, *contra*.

A. J. WALKER, C. J.—In this case it was not necessary that an affidavit of the loss of the note, secured by the mortgage, should have accompanied the bill of foreclosure. When a bill is filed to obtain the benefit of an instrument properly belonging to the jurisdiction of a court of law, upon the ground that it is lost, an affidavit of the loss of the instrument is required. The requisition of the affidavit is a caution required by the chancery court in permitting a transfer of jurisdiction from the court of common law to a court of equity.—1 Mad. Ch. Pr. 27-28; 1 Dan. Ch. Pl. & Pr. 449; Story's Eq. Pl. §478; Whitchurch v. Golding, 2 P. Wms. 541; Walmsley v. Child, 1 Vesey, sr. 341-345; Hove v. Harrison, 11 Ala. 499, 504; Owen v. Paul, 16 Ala. 130. The object of the bill in this case is the foreclosure of a mortgage,—a matter of which a court of law has no jurisdiction. The entertainment of the cause by a court of equity involves no change of jurisdiction, and the affidavit was not necessary.

[2.] The complainants did not produce the note, to secure which the mortgage was given. The bill alleges the execution and loss of the note. The defendant denies

the execution of the note, in a sworn answer; there being no waiver of an affidavit of the truth of the answer. The complainant adduces no proof of the existence and contents of the note, save the recital in the mortgage. Does the recital in the mortgage, which is under seal, establish the existence and contents of the note?

The modern doctrine unquestionably is, that the recital of an instrument in a deed is, as a general rule, primary and conclusive evidence of such instrument, against the grantor and his privies. This doctrine, although it is opposed by some of the English text-books, is too well established by judicial decisions to be now controverted. *Carver v. Jackson*, 4 Peters, 1-83; *Crane v. Morris*, 6 Peters, 598; *Jackson v. Parkhurst*, 9 Wendell, 209; *Jackson v. Brooks*, 8 Wendell, 426; *Dunn v. Cornell*, 3 Johns. Cas. 174; *Jackson v. Livingston*, 10 Johns. R. 384; *Hoyatt v. Phifer*, 4 Dev. Law, 273; *Scott v. Douglass*, 7 Ohio, 228; *Wayman v. Taylor*, 1 Dana, 527; 2 *Smith's Lead. Cases*, top 609, 640, 687; 1 *Phil. on Ev. C. & II's notes*, (4 ed.) 473, n. 130; 2 *ib.* 574, n. 476; *Graham v. Lockhart*, 8 Ala. 9-24; *Mead v. Steger*, 5 P. 498; *Brooks v. Maltbie*, 4 S. & P. 96. While the general rule is as above stated, there are exceptions to it; and we think the recital of a note, in a mortgage given to secure its payment, ought to be excepted from the operation of the rule. The South Carolina court of appeals, having before it the question, whether the recital in a mortgage deed of the bond secured by it dispensed with the production of the bond, held, in general terms, that the recital of an instrument in a deed was not primary evidence of the instrument. We cannot concur in that proposition. But the court, in fortifying its conclusion, gives some special reasons why the recital of a bond in a mortgage should not be primary evidence. Those reasons are, that the bond is assignable, and payments are usually endorsed upon it; and the production of the instrument should be required, to guard against a foreclosure in favor of a party who had transferred the bond, as well as to prevent the deprivation to the defendant of the evidence of payment.—*Chewning v. Proctor*, 2 *McCord's Ch. R.*

11. In a New York case, the same reasoning as to the recital of a mortgage in another deed is advanced in the following guarded language: "Although the existence of an absolute deed or lease may be proved by a recital, against the party making such recital, and all claiming under him; yet, I incline to think, that a mortgage can not be so proved, because it is defeasible by payment of the mortgage-money; and if produced, it might probably show an acknowledgment of satisfaction on the back of it, that being the usual mode."—*Jackson v. Davis*, 18 Johns. R. 7. Aside from the consideration, that payments are usually endorsed upon notes, the inconvenience and injustice which might result from dispensing with the production of a note secured by the mortgage sought to be foreclosed, are so great, that we think the recital in the mortgage, as to the note, should constitute an exception to the general rule, and that the mortgagor should not be estopped from denying the existence of the note as recited in the mortgage.—*Singleton v. Gayle*, 8 P. 273; *Bennett v. Taylor*, 5 Cal. 502.

The recital in the mortgage is, however, a solemn admission of the existence and contents of the note. The affidavits of the complainants make out a *prima-facie* case of loss. It may, therefore, be conceded, that in the absence of the advantage which the mortgagor has by virtue of his sworn answer, the failure to produce the note would be sufficiently explained, and the note sufficiently established. But the admission contained in the mortgage is not sufficient evidence to overcome the positive denial of the answer: it is not equivalent to the testimony of two witnesses, or of one with corroborating circumstances. The complainants have, therefore, failed to establish the existence of the debt, as described in the mortgage and averred in the bill.

It is possible that the evidence may show, that the mortgagor was under a liability to the mortgagee at the date of the mortgage, to a less amount, and of different character from that mentioned in the recital in the mortgage and described in the bill. If such be the case, the complainants were not entitled to a decree of foreclosure

under their present bill. There can be no decree in chancery, without a substantial correspondence between the allegations and proof.

There was no error in dismissing the cross bill. The evidence of the witness Spigner does not authorize a reformation of the mortgage.

Decree reversed, and cause remanded.

ROUNDTREE vs. TURNER.

[ACTION ON CONTRACT AND AWARD FOR OVERSEER'S WAGES.]

1. *Conclusiveness of judicial decision.*—A decision of the supreme court is the law of the case in which it is pronounced, and its correctness cannot be questioned on a second appeal.
2. *Sufficiency of award.*—An averment that the arbitrators, under a submission of all matters in dispute between the plaintiff and defendant, in relation to the crop grown by them on the defendant's plantation, "awarded to plaintiff the one-fifth part of said crop," is sufficiently certain; but, if the award simply determines, "that the contract has been proved, that R. (defendant) was to give T. (plaintiff) the fifth of the crop made for said R.," it is not sufficient to support the averment.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. JOHN E. MOORE.

THIS is the same case which was before this court at its June term, 1857, and which may be found reported in 30 Ala. 706. The second count of the amended complaint was as follows: "The plaintiff claims of the defendant a like sum of \$300, for this: On the 3d day of October, 1854, in said county, plaintiff and defendant agreed to refer all their matters in dispute, in relation to the crops grown by them on said defendant's plantation for the year 1854, to the arbitrament of William Stephens,

Pleasant Hodges, and Moses Maples, and their award thereon to be abided by them; and plaintiff avers, that said referees did meet and decide said controversy, and awarded to plaintiff, on the 7th October, 1854, the one-fifth part of said crop, which (plaintiff avers) was worth said sum of \$300; which award defendant on his part failed and refused to perform and abide by, and refused to deliver or give to said plaintiff the one-fifth part of said crop, according to the terms of the award, though often requested so to do," &c.

The bill of exceptions in the present record states the following facts: "The plaintiff introduced evidence tending to show that, in 1854, he and the defendant made a contract, whereby plaintiff agreed to superintend the making of a crop for defendant that year, for one-fifth part of said crop; that he commenced the superintending of the making of said crop about the 1st March, 1854, and continued until the 12th July, when he was discharged by the defendant. He also proved, that a crop of corn, wheat and oats was made, its amount, and value; and then introduced a written instrument, signed by himself and defendant, in the following words: 'We, S. J. Roundtree and Lewis Turner, having a controversy respecting a crop that we agreed to make together, in the year 1854, now agree and are anxious to leave it to the decision of William Stephens and Pleasant Hodges as referees, and Moses Maples as umpire, on the 7th October, 1854, at Woodville, and agree to make each our statement of the contract, and to introduce any lawful testimony to prove the same; and we agree, if those men are in attendance, to be ready with our evidence for trial, and to abide their decision, this 3d October, 1854.' (Signed by both parties.) The plaintiff further proved, that on the 7th October, 1854, he and defendant, with said Stephens, Hodges and Maples, met at Woodville, pursuant to said agreement; and that said Stephens, Hodges and Maples, having heard the statements and testimony of each party respecting said controversy, then and there made, in their presence, the following award in writing: 'We, the referees, being sworn to decide this case according to law and evidence,

we know of no law that deprives a man of his contract. We also believe that the contract has been proved, that S. J. Roundtree was to give Lewis Turner the fifth of the crop made for said Roundtree.' (Signed by said referees and umpire.) The plaintiff then proved, that after the making of said award, and before the commencement of this suit, he demanded the fifth of said crop, and the defendant refused to deliver it to him; and proved the value of said crop. On these facts, the defendant requested the court to charge the jury, that the plaintiff was not entitled to recover under the second count of his amended complaint; and that said award does not give the plaintiff a right to recover a fifth part of the crop made for the defendant in 1854, but does nothing more than ascertain the contract which the parties made. The court refused these charges, and instructed the jury, that the plaintiff was entitled to recover under said award, on the second count of his complaint, the value of the fifth part of the crop made for defendant in 1854, with interest thereon from the making of said award; to which charge, as well as to the refusal of the charges asked, the defendant excepted."

The charge given, and the refusal of the charge asked, are now assigned as error.

WALKER & BRICKELL, for appellant.—The award is void for uncertainty, and because it is not final and conclusive. Watson on Arbitration and Award, 126; 1 Dallas, 173; 2 Yeates, 539; 4 Rawle, 304; 2 Har. & Gill, 67; 3 Pike, 324; 4 Blackf. 253; 11 Wheaton, 446; 2 Root, 531; 3 Cowen, 72; 1 Ld. Raymond, 123; Cro. Jac. 314; 3 Dow. & Ry. 433; 2 B. & C. 170; 12 Wendell, 380.

ROBINSON & JONES, *contra*.—The award, though not very formal, is substantially sufficient, when construed in connection with the submission; and, under the rule which requires all reasonable presumptions to be made in favor of awards, entitled the plaintiff to a recovery under the second count of his amended complaint.—Reynolds v. Reynolds, 15 Ala. 398; Strong v. Beroujon, 18 Ala. 168.

STONE, J.—When this case was before us at a former term, (30 Ala. 706,) we declared, that the complaint was legally sufficient. The complaint, which contains two counts, is in the same form as when we announced its sufficiency, and must be now held sufficient.

[2.] The second count is based on an award. It avers, that the arbitrators “awarded to plaintiff, on the 7th October, 1854, the one-fifth part of said crop.” This was sufficient, because it furnished the rule for ascertaining the amount to which plaintiff was entitled. *Id certum est, quod certum reddi potest.*—Higgins v. Willes, 3 Mann. & Ry. 382; Platt v. Hall, 2 Mees. & Wels. 391; Waite v. Barry, 12 Wend. 377. But what is claimed as an award in this case, falls far short of proving the averment in the complaint. The arbitrators found but a single fact—viz., the terms of the contract between the parties. That contract was executory, and cast on each party the performance of certain duties. Mr. Turner could claim no compensation from Mr. Roundtree, without averring a performance of his part of the agreement, or giving some valid excuse for its non-performance. The arbitrators failed to find the facts, from which the amount due could be ascertained by calculation or proof; and they failed to find any sum due, which, if they had so found, would have supported their finding, without any recital of facts. The award did not support the second count in the complaint.—Watson on Arb. and Award, (59 Law Lib.,) 204, *et seq.*; Bedam v. Clarkson, 1 Ld. Raymond, 123; Marshall v. Dresser, 3 Ad. & El. (N. S.) 878; Cargey v. Aitcheson, 3 Dowl. & Ry. 433; Grier v. Grier, 1 Dal. 173; Gonzales v. Deavens, 2 Yeates, 539; Parkhurst v. Powers, 2 Root, 531; Carnochan v. Christie, 11 Wheaton, 446; Archer v. Williamson, 2 Har. & Gill, 62; Manuel v. Campbell, 3 Ark. 324; Thinne v. Rigby, Cro. Jac. 314. Several of the rulings of the circuit court cannot be reconciled with these principles.

Reversed and remanded.

GRAY'S ADM'RS vs. CRUISE.

[DETINUE FOR SLAVES.]

1. *Jurisdiction of probate court to grant administration.*—The jurisdiction of the probate court, in the matter of the grant of letters testamentary, and of administration, is original, general, and unlimited; and hence every reasonable presumption will be indulged in favor of its orders, when collaterally assailed.
2. *Validity of grant of administration de bonis non.*—A grant of letters of administration *de bonis non*, when there is in fact no vacancy in the administration, will be held void, even in a collateral proceeding; but it will not be held void, in a collateral proceeding, merely because it fails to show the appointment and removal, resignation, or death, of the administrator in chief; and where the records shows the regular appointment of the administrator in chief, and that on a subsequent day it was ordered that his "resignation be received and recorded," and that letters of administration *de bonis non* were on the same day granted to another, it will be presumed that the resignation was of the office of administrator, and was in writing as required by the statute.
3. *Same.*—Where a transcript from the records of the probate court, purporting to be "a full, true and complete exemplification of the records and files of said court touching the administration" of a decedent's estate, shows a grant of administration *de bonis non*, on condition that the party execute and file a bond, but does not show that the bond was executed and filed as required by the order, it will be presumed in favor of the validity of a subsequent grant of administration, when collaterally assailed, that the party failed to comply with the condition.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. NAT. COOK.

THIS action was brought by David N. McClanahan, as the administrator *de bonis non* of John Gray, deceased, against William Cruise; and was commenced on the 10th August, 1857. The defendant pleaded, in short by consent, the general issue, and *ne unques administrator*; and issue was joined on these pleas. On the trial, as the bill of exceptions shows, after the plaintiff had proved his intestate's ownership and possession at the time of his

death of the slaves in controversy, the defendant's possession at the commencement of the suit, the value of the slaves, and of their annual hire, he offered in evidence a transcript from the records of the probate court of Shelby county, which was certified by the probate judge to be "a full, true and complete transcript and exemplification of the records and files of said court touching the administration of the estate of John Gray, deceased," and which showed the following proceedings:

(December 15, 1845.) "It is ordered, that Mrs. Jane Caroline Gray be appointed administratrix, &c., of John Gray, deceased, on her entering into bond, with security, in the sum of \$2,000. It is ordered, that the bond given pursuant to the above order, with A. E. Nunnally and William Gray sureties, be approved and recorded." (June 12, 1847.) "It is ordered, that the resignation of Jane C. Brewer (late Gray) be received and recorded. It is ordered by the court, that William Brewer be appointed administrator of the estate of John Gray, deceased, on his executing and filing in this office his bond, to approval, in the sum of at least \$2,000." On the 5th August, 1847, leave was granted to said William Brewer, as administrator, to sell the negroes belonging to the intestate's estate. In September, 1847, Brewer filed his accounts and vouchers for final settlement, and the court appointed the 30th October as the day for the settlement. On the 16th October, 1847, Brewer's report of the sale of the negroes was received, and ordered to be filed and recorded. On the 30th October, 1847, a final settlement of Brewer's administration was made by the court, when it was ascertained that there was a balance of \$1128 due from him to the estate; and it was ordered, that he be allowed to retain one-half of this sum, in right of his wife, and pay over the other half to the guardian of the other distributee; and that, on the payment of this sum, "said administrator be discharged." (July 21, 1857.) "This day came David Gray, guardian of John A. Gray, one of the distributees of the estate of John Gray, deceased, and made application to the court for the appointment of an administrator *de bonis non* of said estate; and

it appearing to the satisfaction of the court that said estate has not been fully administered, and that David N. McClanahan is a suitable person to act as such administrator, and he consenting thereto,—it is therefore ordered by the court, that the said David N. McClanahan be, and he is hereby, appointed administrator *de bonis non* of the estate of said John Gray, deceased, and that he enter into bond, with securities, according to law, in the sum of \$5,000; and thereupon let letters of administration *de bonis non* issue to him accordingly." (August 1st, 1857.) "It is ordered by the court, that the bond given by David N. McClanahan, administrator *de bonis non* of the estate of John Gray, deceased, with W. H. Pope and S. A. McClanahan securities, be approved, filed, and recorded; and that letters of administration on the estate of said John Gray be issued."

"The defendant offered evidence to show, that he held said slaves as bailee under hire from William Brewer, who intemarrried with Jane C., the widow of said John Gray; and that said Jane C. was still living. This being all the evidence, the court charged the jury, that if they believed the evidence, the plaintiff was not entitled to recover; to which charge the plaintiff excepted," and which he now assigns as error.

S. LEIPER, L. E. PARSONS, and ALEX. & JOHN WHITE,
for appellant.

GEO. S. WALDEN, and JAS. B. MARTIN, *contra*.

R. W. WALKER, J.—The plaintiff sued as administrator *de bonis non* of John Gray; and the general charge of the court, that if the jury believed the evidence, the plaintiff was not entitled to recover, is sought to be sustained upon the ground, that the order of the probate court, by which he was appointed such administrator, was null and void.

The jurisdiction of the probate court, in the matter of the grant of letters testamentary, and of administration, is original, general, and unlimited. It is, to that extent,

a court of general, not of limited, or special jurisdiction; and hence its order, granting letters of administration *de bonis non*, cannot be held void, in a collateral proceeding, because it fails to show the appointment and removal, resignation, or death, of the administrator in chief.—*Ikelheimer v. Chapman*, 32 Ala. 676.

But this court has, more than once, recognized the principle, that such an order is not *conclusive* evidence of the jurisdiction of the court in the particular case; and that it, in point of fact, there was no vacancy in the administration when the order was made, the appointment will be held void, even in a collateral proceeding.—*Mathews v. Douthitt*, 27 Ala. 273; *Rambo v. Wyatt*, 32 Ala. 363; also, *Lessee of Griffith v. Wright*, 18 Geo. 173; *Miller v. Jones*, 26 Ala. 259.

In the present case, it is insisted, that the presumption of jurisdiction, which would arise from the isolated order for the appointment of the plaintiff as administrator *de bonis non*, is overturned by other parts of the record from the probate court, which, it is alleged, show that there was no vacancy in the administration when the plaintiff was appointed. The point made in support of this proposition is, that it appears from this record that Mrs. Gray had been duly appointed administrator of her deceased husband, and that it is not shown that her administration had ever terminated.

As superior courts act by right, and not by wrong, their acts and judgments are conclusive in themselves, unless plainly beyond the jurisdiction of the tribunals whence they emanate; or, as it is elsewhere expressed, "nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so." In regard to such courts, every presumption is made, in favor not only of their proceedings, but of their jurisdiction. *Grignon v. Astor*, 2 How. (U. S.) 341; *Morgan v. Burnett*, 18 Ohio, 535; *Adams v. Jeffries*, 12 Ohio, 253, 271; *Wright v. Watson*, 11 Humph. 529, 531; *Wells v. Mason*, 4 Scammon, 84, 88; *Cox v. Thomas*, 9 Gratt. 323; *Morrow v. Weed*, 4 Iowa, 77; *Kelsey v. Wiley*, 10 Geo. 371, 382; *Woods v. Crawford*, 18 Geo. 526; *Shumway v. Stillman*,

4 Cowen, 294, 296; 4 Phil. Ev. 109; 1 Smith's L. C. 816, 820, 822. Hence, where the record of a superior court is resorted to for the purpose of showing that a particular judgment or order (which is brought into question collaterally) was beyond the jurisdiction of the court, every reasonable intendment will be made in order to support the jurisdiction. In such cases, the rule is, not that the order is void, unless the record plainly shows that the court had jurisdiction; but, on the contrary, the order must be deemed valid, unless it plainly appears that the court had not jurisdiction; and the leaning of the tribunal in which the order is collaterally assailed, will be to such a construction of the record as will uphold the validity of the proceeding. The fact that the court appointed an administrator *de bonis non*, is, of itself, *prima-facie* evidence that there was a vacancy in the administration, and will be held conclusive, until it is clearly and explicitly disproved.—Authorities *supra*; also, opinion of Stone, J., in Hunt v. Ellison, 32 Ala. 195, 208, and cases cited; Miller v. Jones, 26 Ala. 259; Foot v. Stevens, 17 Wend. 483; Chemung Bank v. Judson, 4 Selden, 254, 260; Hart v. Seixas, 21 Wend. 40.

The probate judges, as is well known, are not always selected for their legal learning; and the records of these courts are often made up without the aid of counsel, and in haste. The rule, that liberal intendments will be indulged in support of the proceedings of courts of general jurisdiction, is, therefore, applicable with peculiar force to probate courts, so far as they are courts of general jurisdiction.—See Miller v. Jones, 26 Ala. 259; Wyatt v. Rambo, 29 Ala. 527-8; Lyon v. Odom, 31 Ala. 238, 240.

Giving to the record from the probate court of Shelby county the benefit of a liberal application of the maxim, *omnia presumuntur rite esse acta*, we do not think that the appointment of the plaintiff as administrator *de bonis non* is shown so clearly to have been beyond the jurisdiction of the court, as that it may be pronounced void in a collateral proceeding. It appears from the record, that Mrs. Gray was duly appointed administratrix of her deceased husband, on 15th December, 1845. The parol evidence

shows that, between that date and 12th June, 1847, she intermarried with one William Brewer. The record shows that, on 12th June, 1847, an entry was made upon the minutes, which consists of two orders, one following the other in immediate succession, as follows: "It is ordered, that the resignation of Jane C. Brewer (late Gray) be received and recorded. It is ordered by the court, that William Brewer be appointed administrator of the estate of John Gray, deceased, on his executing and filing in this office his bond, to approval, in the sum of at least two thousand dollars."

It is true, the record does not state, in so many words, that Mrs. Gray resigned her administration upon the estate of John Gray; nor that her resignation was in writing, as required by law. But the entry does show that she resigned something, and there is no evidence that she held any other office which she could resign to the probate court, except that of administratrix of her deceased husband. As soon as this resignation (whatever it may have been) was received by the court, an order was made, and recorded in the same entry, for the appointment of John Gray; a proceeding which was altogether nugatory, if she had not resigned her administration. Moreover, Mrs. Gray is never, after this, spoken of, or referred to in the record, as administratrix of her deceased husband; but in all the orders and decrees made in relation to the estate, after this date, the court proceeds as if her administration had terminated. No violence is done to the language of the order, by construing it to refer to a written resignation; and, with the view of upholding the validity of the subsequent proceedings, it is our duty to place that construction upon it. Considering this order, in connection with the order for the appointment of Brewer as administrator, which forms part of the same entry, and with the other parts of the record, the most that can be said is, that it is doubtful whether or not the administratrix had in fact resigned. This, as we have seen, falls short of the showing necessary to be made, before the appointment of the administrator *de bonis non* can be treated as void, in a collateral proceeding. The question would be a very

different one upon a direct appeal from the order granting administration *de bonis non*.—Authorities *supra*; also, *Bothwell v. Hamilton*, 8 Ala. 461.

The counsel on both sides concede, that Brewer never was legally appointed administrator. The order made was, that he be appointed administrator, "on his executing and filing in this office his bond, to approval, in the sum of \$2000." The fact that Brewer was subsequently recognized by the court as administrator might, possibly, in the absence of opposing evidence, justify the presumption that he had complied with the order, and given the required bond. But the transcript from the probate court was a complete transcript of the records and "of the files" touching the administration of Gray's estate; and the bond required of Brewer is not to be found in it. There is, therefore, affirmative evidence that no such bond was in fact executed by him; and, in order to sustain the validity of the subsequent grant of administration *de bonis non* to the plaintiff, when collaterally assailed, this appointment of Brewer, under a conditional order which was never complied with, will be disregarded.—See *Hoskins v. Miller*, 2 Dev. 362.

Judgment reversed, and cause remanded.

GOULD vs. MEYER.

[CERTIORARI FROM JUSTICE'S COURT.]

1. *Garnishment on judgment by justice of the peace*.—Under the provisions of the Code, (§§ 2471, 2819,) a justice of the peace has authority to issue a garnishment on a judgment rendered by him.
2. *What constitutes record of garnishment case*.—Where a justice of the peace sends up to the circuit court, in return to a *certiorari*, the affidavit made before him to procure the issue of a garnishment on a judgment, the summons served on the garnishee, the garnishee's answer, the judgment thereon rendered against him, and a statement of the original judgment,—this is, *prima facie*, a suffi-

cient return of the proceedings had in the garnishment case; and it is incumbent on the party who objects to its sufficiency to show affirmatively that there were other proceedings.

3. *Waiver of objection by garnishee to affidavit and summons.*—After a garnishee has appeared and answered, admitting an indebtedness to the defendant, and a judgment has been thereon rendered against him, and he has transferred the cause to the circuit court by *certiorari*, he cannot there raise an objection, for the first time, either to the affidavit, or to the summons of garnishment.
4. *Waiver of right to answer anew.*—If the garnishee, after the rendition of judgment against him by the justice, removes the cause by *certiorari* into the circuit court, and there fails to appear, he cannot complain on error that he was not permitted to answer anew in the circuit court.
5. *Sufficiency of garnishee's answer.*—Where the garnishee's answer admits an indebtedness to the *defendant*, (there being two defendants to the original judgment,) and the antecedent proceedings against him show which one of the defendants is meant, this is sufficient to sustain a judgment against him as the debtor of that defendant.
6. *Answer of garnishee, and who may defend for him.*—On the failure of the garnishee to appear and claim the right to answer anew in the circuit court, his petition for the *certiorari* cannot be received and treated, on motion of his counsel, as a new answer to the garnishment; nor can his surety on the *certiorari* bond be allowed to defend for him.
7. *Judgment reversed and rendered.*—On appeal from a judgment against a garnishee, in a case removed from a justice's court by *certiorari*, an error in the amount of the judgment, which might have been corrected on motion in the circuit court, will be corrected by the appellate court, at the costs of the appellant.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

In this case, it appears that, on the 19th June, 1858, L. H. Meyer obtained a judgment before a justice of the peace, for \$50, against James Richardson and James Robertson; that on the 4th September, 1858, he sued out a garnishment on this judgment before the justice, which was served on A. Brown, as the debtor of said Robertson; that said garnishee appeared before the justice, on the 8th September, 1858, and answered under oath that he would be indebted to "defendant," on the 21st October, 1858, in the sum of \$52 78; that the justice

thereon rendered judgment against the garnishee, on said 21st October, for \$50, and issued an execution on said judgment on the 28th October, 1858; and that the garnishee then sued out a *certiorari* and *supersedeas*, for the purpose of removing the proceedings to the circuit court, and superseding the execution. In answer to the *certiorari*, the justice returned to the circuit court the affidavit made by the plaintiff to procure the garnishment, the summons of garnishment served on the garnishee, the garnishee's answer before him, a statement of the judgment thereon rendered by him, and of the original judgment against Richardson & Robertson, and the execution issued against the garnishee. When the cause was called for trial in the circuit court, as the first bill of exceptions shows, "the counsel for the garnishee moved the court for an *alias certiorari*, requiring the justice to certify all the proceedings had before him" in this cause, on the ground that the papers filed did not constitute a sufficient return to the *certiorari*; which motion the court overruled, and said garnishee, by his counsel, excepted. Said garnishee, by his counsel, then moved the court to set aside said proceedings, and to dismiss him, on the ground that the said justice had no jurisdiction to issue said process of garnishment, because there was no law authorizing it; which motion being overruled by the court, the garnishee, by his counsel, excepted."

The second bill of exceptions states, "that when the cause was called for trial, the defendant's counsel moved the court for a continuance, on account of the absence of the defendant, who had left the State, and for the want of an answer to the garnishment; which motion was overruled by the court, the showing being deemed insufficient. The defendant's counsel then moved the court that, in the absence of the defendant to answer, the petition for a *certiorari* be allowed to stand as an answer to the garnishment;" and produced to the court certain papers, substantiating the statements of the petition, and tending to show that the garnishee was not indebted to said Robertson. "The court overruled the motion, and held that, though the garnishee might answer anew, his

answer could not be made in the manner proposed, although he was absent. The plaintiff then moved for judgment against the garnishee, and read to the court the papers on file, but offered no further proof. To this the defendant, by his counsel, objected, on the ground that the evidence was not sufficient to entitle the plaintiff to judgment; but the court overruled the motion, and rendered judgment for the plaintiff. H. N. Gould, the surety on the *certiorari* bond given by the garnishee, then made the same motion and objections on his own behalf, and insisted that, if the plaintiff sought to make him liable as such surety, he had the right to make defense on the merits in his own behalf, on the abandonment or absence of the garnishee. But the court ruled, that the surety could not thus make defense, and that the plaintiff was entitled to judgment against him; and therefore overruled said motions and objections of said surety. To all which opinions, rulings and decisions of the court, the said garnishee and his surety each severally excepted."

The appeal is sued out by Gould alone, but errors are assigned in the names of himself and Brown jointly, embracing all the rulings of the court to which exceptions were reserved.

GEO. N. STEWART, for appellant.

G. Y. OVERALL, *contra*.

A. J. WALKER, C. J.—Justices of the peace have authority to issue garnishments, for the collection of judgments rendered by them. Section 2471, found in chapter 20, title 1, part 3, of the Code, authorizes the issue of garnishments for the collection of judgments; but it contains provisions indicating that it was not designed to include justices of the peace. Section 2819 of the Code declares, that the provisions of the title above referred to, so far as they are applicable to suits before justices, and not contradicted by any provisions of the title in which section 2819 is found, are "in full force as to the rights of parties and to suits brought before justices." The statute authorizing the issue of garnishments upon

judgments is susceptible of application to suits before justices, and is not contradicted by any thing contained in the title which includes section 2819. We, therefore, regard that section as bestowing the same authority to issue garnishments after judgment upon justices of the peace, as is by section 2471 bestowed upon the circuit court clerks. It follows, that there was no error in the refusal of the court below to treat the garnishment proceedings before the justice of the peace as void for want of jurisdiction.

[2.] The justice of the peace, in return to the *certiorari*, sent up the affidavit made to procure the garnishment, the summons of the garnishee, with the endorsement of service upon it, the answer of the garnishee, and the execution against the garnishee, with a statement of the judgment against him, and of the original judgment against the plaintiff's debtor. The papers in the original cause did not belong to the garnishment suit. The justice transmitted the papers and statement from his docket which give a complete history of the regular and accustomed proceedings in a garnishment case before a justice of the peace.—*Faulks v. Heard & Due*, 31 Ala. 516. It is true, there might have been other proceedings and other papers in the cause, which it was the justice's duty to send up to the circuit court; but, if such was the case, it is not shown by the record, and we cannot presume it. The defendant excepted to the refusal of the court to award a *certiorari*, to compel the justice to certify all the proceedings before him, upon the ground that the papers filed did not constitute a sufficient return. It does not appear from the bill of exceptions, or other part of the record, that the return was incomplete; and we cannot hold that the court erred in refusing the *certiorari*. The motion for a *certiorari* had no reference to the justice's certificate, and we are not called upon to pronounce upon its sufficiency or insufficiency, as the appellant must be confined to the specific motion made by him.—*Wolfe v. Parham*, 18 Ala. 441.

[3.] The garnishee came in, and submitted to answer before the justice; making no objection, so far as we can

learn, to the affidavit upon which the garnishment issued, or to the summons. A judgment was rendered against him by the justice, upon an admission of indebtedness; and he then, by *certiorari*, transferred the case to the circuit court. After these proceedings, it was too late for him to object, either to the affidavit, or to the summons.—*Marston v. Carr*, 16 Ala. 325; *Daniel v. Hopper*, 6 Ala. 296; *Smith v. Chapman*, 6 Port. 365; *Clough v. Johnson*, 9 Ala. 425; *Goss v. Davis*, 21 Ala. 475; *Couch v. Atkinson*, 32 Ala. 633.

[4.] The garnishee cannot complain on error, that he was not permitted to answer anew in the circuit court; because he never appeared and offered to answer.—*Case & Pate v. Moore*, 21 Ala. 758; *Colman v. Waters*, 3 Porter, 381. Whether the circuit court ought to have continued the cause, in order that the defendant might, at a future term, appear and answer, was a question addressed to the discretion of the circuit court; and the decision upon it is not revisable.

[5.] The answer distinctly admits, that the garnishee would be indebted, on the 21st October, 1858, the day on which the justice's judgment was rendered, in the sum of \$52 78, to the defendant. There were two defendants in the original judgment; but there can be no doubt as to the defendant to whom the garnishee acknowledged an indebtedness, for that is clearly shown by a reference of the answer to the antecedent proceedings against the garnishee. The answer is, therefore, an admission of indebtedness at the date of the judgment, for an amount exceeding that for which judgment was rendered against the garnishee; and, by fair intendment, the indebtedness was to the defendant as whose debtor the garnishee was summoned. Such an answer fully justified the judgment rendered upon it.

[6.] We know of no law which required the court to permit the filing of the petition for a *certiorari* as an answer to the garnishment. If such a practice were established, it would destroy the statutory right to have an oral answer.—Code, § 2540. The surety on the *certiorari*

bond had obviously no right to intervene and become an active party in the proceedings against the garnishee.

[7.] The judgment of the court below against the garnishee is for too much; but the correction might have been made in the circuit court, upon motion, and will be made here, at the costs of the appellant. The judgment of the court below must be reversed, and a judgment must be here rendered for fifty dollars, with interest from the date of the justice's judgment against the garnishee, and the costs of the circuit court.

BENNETT'S ADM'R vs. BENNETT.

[BILL IN EQUITY BY WIDOW, AGAINST HUSBAND'S ADMINISTRATOR.]

1. *When widow may come into equity, against husband's administrator.*
A widow cannot maintain a bill in equity, against the administrator of her deceased husband, to recover money belonging to the corpus of her statutory separate estate, which the husband had received in his life-time, and had not paid over or accounted for. (A. J. WALKER, C. J., *dissenting*.)

APPEAL from the Chancery Court of Wilcox.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Margaret C. Bennett, the widow of Jerome Bennett, deceased, against Burgess Bennett, the administrator of said Jerome Bennett; and alleged the following facts: That the complainant and said Jerome Bennett were married in Wilcox county, Alabama, in June, 1850; that the complainant at that time owned a large amount of personal property, which was in the hands of her guardian, and certain real estate in Mississippi; that her husband afterwards received from her guardian a large amount of money belonging to the complainant's separate statutory estate, and the money

arising from the sale of her lands in Mississippi, which he never paid over or accounted for, but converted to his own use; and that he died in 1855. The prayer of the bill was, "that an account may be taken between complainant and the estate of her deceased husband, to ascertain what amount is due her from said estate, on account of moneys received by said Jerome Bennett in his life-time, belonging to the complainant's separate estate;" and for general relief. The defendant answered the bill, asserting his ignorance of its material allegations, and requiring proof thereof. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and ordered an account to be stated by the master; and his decree is now assigned as error.

JNO. T. MORGAN, and D. W. BAINE, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—The case of *Sessions v. Sessions*, 33 Ala. 522, was decided on the basis, that the money sought to be recovered was the separate estate of Mrs. Sessions, under our statutes to secure to married women their separate estates. In that case, we held, that a bill in chancery would not lie against the administrator of a deceased husband, for money—the *corpus* of the separate estate—which the latter had received in his life-time, and had not accounted for.—See, also, *Jenkins v. McConico*, 26 Ala. 213.

The present case is, in principle, precisely the same as *Sessions v. Sessions*, and under its authority, the decree of the chancellor is reversed; and this court, proceeding to render such decree as the chancellor should have rendered, doth hereby order and decree, that the bill of complainant be dismissed, at her cost, both in the court below and in this court.

A. J. WALKER, C. J., dissents from this opinion, and is in favor of overruling *Sessions v. Sessions*, *supra*, and of holding that, in cases like the present, there is a concurrent remedy, both in law and in equity. In support of

his view, he cites the following cases : *Andrews v. Huckabee*, 30 Ala. 143 ; and *Jenkins v. McConico*, *supra*.

BROOKS vs. POLLARD.

[ACTION BY PURCHASER, AGAINST BROKER, TO RECOVER PRICE OF SLAVE SOLD WITHOUT LICENSE.]

1. *Construction of statutes prohibiting sale of slave by broker or agent without license.*—Neither the 17th sub-division of section 397 of the Code, nor the act of 1856 amendatory thereof, (Session Acts 1855-6, p. 25,) prohibits a broker or agent for the sale of slaves from selling a slave belonging to himself, without license.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by Thomas F. Pollard, against Augustus Brooks, to recover the sum of \$800, paid by plaintiff to defendant, on the 12th October, 1857, as the price of a slave. The complaint alleged, that the defendant was a negro-trader, broker, or agent for the sale of slaves, and sold the slave without having a license, as required by the 17th sub-division of section 397 of the Code ; and that the action to recover back the purchase-money was brought under section 400. The defendant pleaded the general issue, in short by consent, and several special pleas ; averring that the slave sold by him was his own property, and that the sale was not made by him as a negro-trader, broker, or agent for the sale of slaves. Issue was joined on the first plea, and demurrers were sustained to the several special pleas. The court charged the jury, in substance, that if they believed the defendant was engaged in the business of a negro-trader, broker, or agent for the sale of slaves, and sold the slave at his place of business, without having procured a license as required

by section 397 of the Code, then they must find for the plaintiff, although they might also believe from the evidence that the slave belonged to the defendant, and was not bought by him for the purpose of speculation. This charge, to which the defendant reserved an exception, is now assigned as error, together with the adverse rulings of the court on the pleadings and evidence.

WM. BOYLES, for appellant.

R. B. ARMISTEAD, *contra*.

R. W. WALKER, J.—Section 397 (sub-division 17) of the Code provides, that on the payment of a special tax, license is to be granted “to sell, offer, or expose for sale any slave, by a negro-trader, broker, or agent for the sale of slaves.” By section 399 it is provided, that if any person, “being a negro-trader, broker, or agent for the sale of slaves,” sells, or offers to sell a slave, without first obtaining a license, he must, on conviction, be fined not less than the amount of the State tax for the license. Section 400 provides, that in addition to this penalty, “the sale of a slave by a negro-trader, broker, or agent for the sale of slaves, is void as to the seller, and the purchase-money may be recovered back, by action commenced within one year from the payment thereof.”

In *Brooks v. The State*, (30 Ala. 516,) this court, in construing section 397, said: “Traffic in slaves, as a business or employment, was the subject under consideration; and we think the language relates to nothing else. * * * * The intention was to derive revenue from the business—the traffic—in slaves by negro-traders, brokers (for the sale of slaves), and all other agents for the sale of slaves. It is only those brokers and agents who are, as such, engaged in the sale of slaves as a business, who are provided for in the section of the Code we are considering.”

If we look alone to the provisions of the Code, it is obvious that the only sales by brokers or agents, which they were designed to embrace, are such as are made by them in the capacity of broker or agent. As a person

can not act in the capacity of broker or agent in selling his own property, it follows that the Code does not require that one who is not a negro-trader, but is simply a broker, or agent for the sale of slaves, must obtain a license, before he can legally sell one of his own slaves.

It is insisted, however, that the amendatory act, approved Feb. 7, 1856, (Acts '55-6,) rendered it illegal for a broker or agent for the sale of slaves to sell a slave belonging to himself, without license. The first section of this act so amends sub-division 17 of section 397 of the Code, as to exempt from license or tax the sale or offer for sale of slaves, by auctioneers, brokers, or agents for the sale of slaves, provided that affidavit is made that the slave so sold or offered for sale is the property of a resident of this State, and that such resident has owned said slave for more than one year preceding the offer for sale within this State. The second section provides, that "*this act shall be so construed as to apply only to such slaves as may be sold by any trader, broker, auctioneer, or agent, on commission, for citizens of the State, and which slaves have been owned in the State for more than one year preceding the sale; and shall in no case apply to any slave owned by any trader, broker, auctioneer, or other person selling slaves on speculation, or as a business; and the affidavit required in the preceding section shall set forth these facts.*"

The whole difficulty grows out of the clumsy phraseology of the second section. But looking at the entire act, we think its only purpose was to narrow—not to extend the operation of section 397 of the Code. It adds no new penalties, nor does it create a new offense. It simply exempts from the influence of the Code a class of sales which had been previously governed by its provisions, and which the legislature considered should not be burthened with taxation, or subject to the heavy penalties provided for by sections 399-400.

The first section, as already stated, relieves from the operation of section 397 of the Code certain sales of slaves by auctioneers, brokers, or agents for the sale of slaves. But that section, standing by itself, would, perhaps, have

been open to misconstruction and evasion, by reason of the vagueness of the term "residents of this State," and also because it does not expressly require that there should be an ownership of the slave *in this State* for twelve months preceding the sale. To obviate these defects, and remove all uncertainties arising out of the language of the first section, the second section was added, which does not profess to do more than to define with greater precision the sales to which "*this act*" shall be construed to apply. In other words, the first section was intended to withdraw from the operation of section 397 of the Code a certain description of sales, but it failed to define with the requisite clearness the particular class of sales which was meant to be thus exempted from license and tax; the second section was added to complete this imperfect definition, and is to be construed as simply explanatory of the first, and not as introductive of a new offense, or of new subjects of license and tax, not provided for by the Code. The language of the entire act shows, that it was intended to restrict the operation of section 397 of the Code, by dispensing with some of the licenses therein required, and precludes the idea of a design to extend the requirement for a license, to sales not embraced by the provisions of the Code. It follows, that the sale by a broker or agent, of a slave belonging to himself, is unaffected by the act of 1856; and its legality must depend upon the previous law, as found in the Code.—See *Brooks v. State*, 30 Ala. 516-7.

There is, as we have seen, nothing in the Code, which deprives a broker or agent for the sale of slaves (not being a negro-trader) of the right to sell, at private sale, and without special license therefor, a slave belonging to himself. Such a sale is not a sale by a broker or agent for the sale of slaves, within the meaning of the Code, and is not subject to the penalties imposed by sections 399 and 400.

The rulings of the city court were in conflict with the opinion here expressed; and, as this view of the main question involved will probably be decisive of the case on

another trial, we will not consider any of the other questions presented by the record.

Judgment reversed, and cause remanded.

McCRARY vs. HARRISON.

[MOTION TO SET ASIDE STATUTORY AWARD.]

1. *Requisites of award.*—A decision by arbitrators, after an examination of the books submitted by the parties, ascertaining a balance in favor of one of the parties, but reserving to themselves the power to make alterations and corrections on the suggestion of errors by the parties within a specified time, has not the finality requisite to an award.
2. *Same.*—Where three arbitrators are selected by the parties, under a statutory submission, (Code, §§ 2710–13,) an award signed by two of them only, in the absence of the third, and without notice to him, is, *prima facie*, void; and the fact that the one who was absent dissented from the conclusion attained by the others, on a former day, as the basis of their final award, instead of excusing the omission to notify him, shows the greater necessity of notice.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THE parties to this case, P. R. McCrary and L. C. Harrison, having a controversy respecting the settlement of a mercantile partnership which had existed between them, entered into a written agreement, under seal, dated the 23d September, 1857, to submit the matters in dispute to the arbitrament of R. A. Baker, B. J. Harrison, and R. H. Crosswell; the award to be entered up as the judgment of the circuit court, under the provisions of the Code. Two of the arbitrators having made an award, the same was filed in the office of the circuit clerk, who thereupon issued an execution against McCrary, for the sum ascertained to be due from him to Harrison. At the next en-

suing term of the court, McCrary moved to quash the execution, and to set aside the award, on the following grounds: "1st, that said award is illegal and void on its face; 2d, that the arbitrators had no authority to render said award; 3d, that the authority to render the award was revoked, and notice thereof given to the arbitrators and said Harrison, before the making of said award; and, 4th, that said award is without authority, irregular and void." On the trial of this motion, the only evidence before the court being the submission, the award, the execution, and the statement of a witness tending to show a revocation of the submission by McCrary, the court overruled the motion, and refused to suppress the award; to which McCrary excepted, and which he here assigns as error.

The award was in the following words:

"Summerfield, Ala., Dec. 14, 1857.

"We, the undersigned, arbitrators, acting under an arbitration bond, signed by L. C. Harrison and P. R. McCrary, dated the 23d September, 1857, do hereby certify, that upon an examination of the papers submitted to us by A. Sexton, who was appointed accountant by us, the following statement is substantially correct—viz., the balance of the amount paid by L. C. Harrison, over the amount received by him from the firm, with interest thereon to the 1st January, 1858, is \$10,723 69; and we find P. R. McCrary indebted, of this amount, for his store account, \$3,348 51; also, one-half the deficit of the business, \$2,419 06; which makes the total indebtedness of P. R. McCrary to L. C. Harrison, \$5,767 57, due the 1st January, 1858; the notes and accounts uncollected, and the furniture jointly owned by them, to be divided by them in such manner as may be agreed upon between themselves. Now, this decision is made with the distinct understanding by said Harrison and McCrary, that P. R. McCrary shall be entitled to the books and papers of the firm, until the 1st day of April next, at which time he shall deliver them up to any one of the arbitrators, at Summerfield, with the privilege of pointing out any er-

McCrary v. Harrison.

rors which he may detect, and submit the same in writing; after which time, L. C. Harrison shall be entitled to the same privilege, until the 1st June, 1858; after which, at such time as the arbitrators shall find convenient, they shall meet and decide the same, which shall be binding upon both parties. Given under our hands the day and date above written."

(Signed by R. A. Baker and R. H. Crosswell.)

"May 4, 1858. The undersigned, arbitrators, acting under and by virtue of an instrument in writing, executed by L. C. Harrison and P. R. McCrary on the 23d September, 1857, submitting certain matters in dispute between them to the arbitrament of the undersigned and B. J. Harrison; which matters, after the arbitrators were first duly sworn according to the law in such cases provided, we did, on the 14th December, 1857, proceed to hear and determine, after first having given more than three days previous notice of the time and place for hearing the parties, and did then and there render the above and foregoing conditional award, (they being present during the trial;) and now, at this day, the said P. R. McCrary having failed to file any exceptions to said award, or to present to us any result whatever, after examining the books within the time prescribed therein, but has only given us notice that he will not abide by such award; and the said Harrison having, in our presence, waived his right to file any exceptions to said award,—we do now proceed to make said award final and conclusive upon the parties, and do award and decide, that said P. R. McCrary pay to the said L. C. Harrison the sum of five thousand seven hundred and sixty-seven 57-100 dollars, with interest from the 1st day of January, 1858; and that the uncollected notes and accounts of said firm, and the furniture jointly owned by them, be divided between them; and that both parties pay each one-half the costs in this proceeding; and that a copy of the award be served on each of the parties. The undersigned, in connection with B. J. Harrison, acted together with unanimity, until the 14th December last, at which time said Harrison declined to

sign the foregoing decision. Witness our hands and seals, this 7th day of May, A. D. 1858.

(Signed by R. A. Baker and R. H. Crosswell.)

PETTUS, PEGUES & DAWSON, with ALEX. & JNO. WHITE,
for the appellant.

BYRD & MORGAN, *contra*.

A. J. WALKER, C. J.—No final decision was made by the arbitrators on the 14th December, 1857. The conclusion then expressed, after examination of the papers submitted, was expressly made subject to future alterations, upon the suggestion of errors by the parties. It was not an award. There was an express reservation of authority over the subject of arbitration. The matter remained *sub judice*. A valid award must finally dispose of the questions submitted. The reservation of authority by arbitrators is inconsistent and irreconcilable with the idea of an award.—Watson on Awards, 216, 230 ; Russell on Arbitrators, 272, 252, 268.

[2.] On the 14th December, 1857, the arbitrators appointed the 1st April, 1858, as the time at which the appellant should deliver the books and papers of the partnership, which were left with him, and submit a written statement of such errors as he might detect. The arbitrators do not seem to have taken any action on that day; but subsequently, on the 4th May, 1858, two of the arbitrators rendered a final judgment. This judgment does not appear to have been rendered either with the knowledge of, or after notice to the third arbitrator. It is simply stated that the third arbitrator declined, on the 14th December, to sign the written conclusion then expressed. We pass by, without deciding, the question whether a majority of the arbitrators chosen by the parties, with a view to their action under chapter 9, title 2, part 3, of the Code, can proceed at all in the absence of the rest, until their places are supplied, as provided in section 2713 of that chapter. But, conceding that they may, it is certain that the majority could not meet and adjudge the matter of controversy, without giving notice

to the remaining arbitrator, and affording him an opportunity to be present and participate in their deliberations. The parties stipulate for the counsel and capacity of all the arbitrators; and it is as irreconcilable with reason and justice, as it is with the authorities in the law, that a part of the arbitrators should proceed to a final judgment, without notice to the rest.—Dalling v. Matchet, Willes, 215; Russell on Arbitrators, 208, 210, 160, 161; Watson on Awards, 73; Cumberland v. North Yarmouth, 4 Greenleaf, 459; Short v. Pratt, 6 Mass. 496; White v. Sharp, 12 M. & W. 711; Henderson v. Burkley, 14 B. M. 292; McInroy v. Benedict, 11 J. R. 402; Goodman v. Sayre, J. & W. 261; Tusc. Bridge Co. v. Jemison, 33 Ala. 476. The fact that there was a previous dissent on the part of the absent arbitrator from the opinion of the majority, afforded no reason for an omission to notify him. The importance of his presence was rather increased by that fact. Peradventure, he might have convinced his co-arbitrators of their error. The presence of all the arbitrators, or an opportunity to be present, was requisite as long as the case remained under consideration. As that which was done on the 14th December, 1857, was not a final disposition of the subject of arbitration, the presence of the third arbitrator, or a notification to him, was indispensable.

In the absence of any recital in the award that the third arbitrator had notice or was present, and of all evidence of such fact, it is impossible to affirm the judgment of the court below. The award was, at least *prima facie*, void.

Judgment reversed, and cause remanded.

VAN ASPEN *vs.* TOWNSEND.

[ACTION OF FORCIBLE ENTRY AND DETAINER.]

1. *Variance between summons and complaint.*—In an action of forcible entry and detainer, or unlawful detainer, removed by appeal from a justice's court into the circuit court, (Code, §2864,) the cause being triable *de novo*, the complaint should not be rejected, on account of a variance between it and the cause of action endorsed on the summons issued by the justice.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. McKINSTRY.

THIS action was brought by the appellant, and was commenced in a justice's court. The cause of action endorsed on the justice's summons was, "Unlawful entry and detainer;" while the complaint was for a forcible entry and detainer. After the removal of the cause to the city court, by appeal, the defendant moved to strike the complaint from the files, because of the variance between it and the endorsement of the summons; and the court sustained the motion. This ruling of the court, to which the plaintiff excepted, is now assigned as error.

R. B. ARMISTEAD, for appellant.

OVERALL & MOULTON, *contra*.

STONE, J.—We think the city court erred in rejecting the complaint, because of a variance between it and the justice's endorsement on the summons of the cause of action. Proceedings such as this are triable anew, without regard to any defect in the proceedings before the justice.—Code, § 2864.

Reversed and remanded.

WILLINGHAM AND WIFE vs. HARRELL.

[BILL IN EQUITY TO SET ASIDE AWARD.]

1. *Waiver of objection to award.*—A court of equity will not set aside an award, on account of an objection of which the complainant was fully advised at the time he executed it.
2. *Allegations of bill.*—In a bill to set aside an award, a general charge that the arbitrators “were guilty of fraud, partiality and corruption,” without a specification of particulars, is wholly insufficient.
3. *Distinction between statutory and common-law arbitrations; oath of arbitrators.*—The fact that the matters submitted to arbitration were at the time involved in pending suits, is not sufficient to show that the submission is under the statute, (Code, § 2709-10,) when the stipulations of the parties, and the proceedings of the arbitrators, are both at variance with the provisions of the statute; and when the arbitration is not under the statute, there is no rule of law requiring the arbitrators to be sworn.
4. *Return of award to court.*—When the arbitration is not under the statute, and there is no agreement that the award shall be returned into court, it is not necessary that it should be so returned, although the matters submitted were at the time involved in pending suits.
5. *Laches.*—A court of equity will not set aside an award, on the application of a party who, more than two years before the filing of his bill, voluntarily paid more than one-half of the amount found against him by the arbitrators, and gave his notes for the residue; and who, if he had exercised ordinary prudence and circumspection, would have been fully informed before he executed it of the existence of the facts on account of which he seeks to set it aside.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 12th June, 1858, by Benjamin C. Willingham and wife, against Josiah J. Harrell and wife, for the purpose of setting aside an award. Mrs. Willingham, prior to her marriage with the said Benjamin C., was the widow of Warren A. Brantley, deceased, who died in August, 1838; and had also qualified as executor of his last will and testament, and as

guardian of her two infant children by him, Louisiana and Warren Brantley. On her marriage with said Willingham, which took place in March, 1847, the latter became administrator and guardian in right of his wife, and from that time acted jointly with her in the management of both trusts. On the 21st March, 185-, (the date is left in blank in the bill, and is not supplied by any other part of the record,) said Louisiana Brantley was married to Josiah J. Harrell. On the 17th October, 1855, Harrell and wife filed two bills in chancery against Willingham and wife, to compel them to settle their administration and guardianship. On the 20th October, 1855, said Harrell and Willingham, each professing to act for himself and his wife, entered into a written obligation, under seal, to submit to arbitration the matters involved in these two suits. The submission stipulated, that each party should select one arbitrator, with power to the persons so selected to choose a third; and, after stating the principles on which the account should be taken, and providing that the arbitrators should not examine either of the parties without the consent of the other, proceeded as follows: "All other points and matters connected with said estate and guardianship, not herein provided for, if not settled by the parties hereto, are to be settled by said chancery court, under the bills, answers and proof; and should either party fail or refuse to carry out or abide by the foregoing articles and this agreement, then the said chancery court is authorized to carry out and execute the same, according to their true intent and meaning, and to make said settlements in conformity thereto, so far as is herein provided for; and as to matters not herein specifically provided for, said court will settle according to the rules and principles of courts of equity in this State." Under this submission, on the 21st November, 1855, the arbitrators stated an account between the parties, and awarded the sum of \$33,038 as the balance due from Willingham to Harrell.

The bill alleged, that the arbitration was made under the statute; and that the award of the arbitrators was irregular, illegal and void, for the the following reasons:

"1.—The said arbitrators, in making said award, were guilty of fraud, partiality and corruption. 2.—The said arbitrators were not sworn as required by the statute, nor were they sworn in any other manner as such arbitrators. 3.—The said arbitrators refused to allow W. F. Harrell and said complainant Benjamin C. to appear before them as witnesses to prove the ages and hires of the negroes, as had been agreed between the parties to said arbitration, but, at their own option, called before them the overseer, who was a comparative stranger to the slaves, and the slaves themselves, one at a time, and examined them, and adjusted the hire of each upon such observation and evidence of the overseer. 4.—The said arbitrators refused, when sitting as aforesaid, to let said Willingham or said Harrell go before them,—they being the parties to said submission, and entitled to be sworn and give evidence. 5.—The said arbitrators placed an enormous hire upon the slaves, and compounded interest upon it annually, without any legal rests; in fixing the hire of the slaves, they paid little (or no) regard to their ages, sex or condition,—charging complainant with \$9,000 more than he ought to be charged with. 6.—The said arbitrators placed an enormous and unwarranted rent upon the lands of said Warren A. Brantley, not regarding the quantity cleared from year to year, rating it too highly, allowing complainant nothing for the improvements upon the same, and charging him too much by \$3,000 in the aggregate. 7.—They gave complainant no credit for \$2,000, which he and his said wife paid on their testator's purchase of his real estate after his death. 8.—After said award was made, no return thereof was made to said chancery or other court. 9.—After making said award, said arbitrators never furnished complainant with a copy thereof; and he never saw it, or knew of its contents and details, until about April last,—having attempted to perform it, to the extent above stated, upon verbal information as to its aggregate amount from some of the parties, attorneys, or arbitrators." (The acts of part performance of the award alleged in the bill, being stated in the opinion of the court, it is not necessary to repeat them here.)

The chancellor dismissed the bill, for want of equity; and his decree is here assigned as error.

D. W. BAINE, with GEO. W. GAYLE, and PETTUS, PEQUES & DAWSON, for the appellants, cited Watson on Arbitration, 262, 294; Russell on Arbitration, 672, 674.

BYRD & MORGAN, *contra*, cited Sharpe v. King, 3 Ired. Eq. 402; Johnson v. Ketchum, 3 Green's Ch. 364; McRae v. Buck, 2 Stew. & P. 155; 3 Atk. 529.

R. W. WALKER, J.—1. The application to set aside the award is based upon nine distinct grounds, which are stated in numerical order in the bill. Of the existence of three of these objections to the award the complainant was fully advised at the time he proceeded to execute it. Of course, these objections are worthless as a foundation for such an application.

2. The six grounds of objection, of the existence of which the complainant alleges that he was ignorant when he performed the award, are those which are numbered in the bill as the 1st, 2d, 5th, 6th, 7th and 8th. The 1st is a general charge, that "the arbitrators were guilty of fraud, partiality and corruption, in making the award." To this objection it is a sufficient answer to say, that in a bill to set aside an award, the particular ground on which it is impeached ought to be charged with all its circumstances. Russell Arb. 676; Tittenhouse v. Reat, 3 Atk. 529. A general charge of fraud, partiality and corruption, without specification of particulars, is wholly insufficient.

3. The 2d objection is, that the arbitrators were not sworn. Without intending to intimate that there may not be other satisfactory answers to this objection, we mention one which we consider conclusive—that is, it was not necessary that the arbitrators should be sworn. It is obvious, we think, that this cannot be considered as an arbitration under the Code. Though the matters submitted were involved in suits then pending, there was no agreement that the submission should be, nor was it, made an order of court; and contrary to the rule which governs

in statutory arbitrations, it was stipulated that neither party should be a witness without the consent of the other. See Code, §§ 2709, 2718. The proceedings appear to have been conducted throughout without reference to the regulations prescribed for arbitrations under the Code; the arbitrators were not sworn; they refused to allow the parties to the submission to be present; they did not deliver copies of their award to the parties; the award was not returned to the court in which the suits were pending; nor was any attempt made to have it entered up as the judgment of that court. These facts, most of which were known to the complainant before he performed the award, show that the parties did not intend or treat this as a statutory arbitration; and the complainant cannot now insist that it was. As the arbitration was independent of statute, there is no rule of law, which required that the arbitrators should be sworn.—Howard v. Sexton, 4 Comstock, 157; Sloan v. Smith, 3 Cal. 406; Forqueron v. Van Meter, 9 Ind. 207.

4. Another ground of objection is, that the award was not returned to court. We do not perceive how it is possible that the complainant can have been injured by this circumstance. How can he complain that the award was not returned to court, when, without waiting for that to be done, he at once proceeded to execute it? Besides, it was no part of the agreement that the award should be returned to, or be made the decree of the court; and as the arbitration was not under the Code, there was no necessity that it should be done.

5. The other three objections are, in substance—that the arbitrators placed an enormous hire upon the slaves, the aggregate amount charged against the complainant on this ground being \$9,000 more than he ought to pay; that the allowance for rent of the land was grossly unreasonable, exceeding by \$3,000 what was justly due; and that the arbitrators failed to give the complainants credit for \$2,000 paid by them on account of a land purchase made by the testator in his life-time. Passing by the question, whether a court of equity would, under any circumstances, set aside an award for such objections as

these, it is obvious that they can be of no avail in this suit, for the reason that, if the complainant was not fully advised of the existence of all of them, at the time he proceeded to perform the award, his ignorance was the result of his own gross negligence. The award was made on the 21st November, 1855. A simple inspection of it would have informed the complainant of the amounts allowed for the hire of negroes and rent of land, and that no credit had been given him for the \$2,000 paid for land purchased by the testator. But, without taking the trouble to examine the award, which he does not pretend he ever sought to do, the complainant chose to rely upon mere verbal information as to the aggregate amount allowed by the arbitrators, and, as early as the 24th November, 1855, began to pay it off. On that day, he paid the defendant \$4,000. Two days afterwards, he conveyed to the defendant a valuable tract of land, and a house and lot, and transferred to him sundry notes on third persons, which conveyances and transfer were made by the complainant, and accepted by the defendant, as a payment to the extent of \$15,699 67 on the award. He made another small payment in December. On the 18th April, 1856, he executed to the defendant four notes, amounting in the aggregate to \$11,021 00; and on the 26th April, 1856, he made a further payment of about \$2,000; the entire amount thus paid and agreed to be paid by the complainant being \$33,038 00, which is the exact amount of the award. Having thus actually paid about two-thirds of the amount of the award, and settled the balance, by giving his notes with security therefor, the complainant, after the lapse of more than two years from the date of his last payment and of the execution of his notes, files this bill to set aside the award. After thus blindly closing the transaction in pursuance of the award, he has no right to appeal to a court of chancery to relieve him from the consequences of his own neglect, by setting aside the award, upon grounds of the existence of which, if he had exercised ordinary circumspection, he would have been fully informed before concluding the settlement. It must be a very strong case to justify a court of chancery in

opening an award, after the party making the application has actually paid more than one-half of the amount found to be due by the arbitrators, and settled the balance by giving his notes therefor.—Johnson v. Ketchum, 3 Green's Ch. 364; also, Sharpe v. King, 3 Ired. Eq. 402; Atkinson v. Manks, 1 Cow. 691; Picton v. Graham, 2 Dess. 592; Tyler v. Stephens, 7 Geo. 278; Forqueron v. Van Meter, 9 Ind. 270; Steele v. Kinkle, 3 Ala. 352; McRae v. Buck, 2 St. & P. 155.

The amendments proposed would not have relieved the complainants from the imputation of *laches* so clearly justified by the allegations of the original bill; and hence, they have sustained no injury in consequence of the chancellor's refusal to allow the bill to be amended.

Decree affirmed.

GIMON vs. DAVIS.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Destruction of deed*.—The destruction of a deed, by or with the consent of the grantee, does not re-invest the grantor with the legal title to the premises conveyed.
2. *Estoppel en pais*.—An estoppel resting in parol can have no effect at law, upon the title to land.
3. *Constructive notice of mortgage and unregistered deed*.—The registration of a mortgage is constructive notice only to those who hold under the mortgagor, (correcting *dictum* in *Center v. P. & M. Bank*, 22 Ala. 743;) but, if the mortgagor, having voluntarily destroyed an unregistered deed to himself, and procured the execution of a deed by his vendor to a trustee for his wife, joins with his wife and the trustee in a conveyance to a purchaser, the registration of the mortgage charges the purchaser with constructive notice of such unregistered deed, and he cannot successfully defend an action at law by one claiming under a subsequent purchase at execution sale against the mortgagor.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Dominique Gimon, against Isaac S. Davis, to recover a city lot in Mobile, which was particularly described in the complaint. The only plea was, not guilty. The plaintiff derived title under a purchase at sheriff's sale, under execution against John Ives, and a sheriff's deed dated the 2d April, 1855; while the defendant claimed under a deed from Thomas Condon, as trustee for the wife of said Ives and her children, and said Ives and wife, dated the 20th March, 1856. It appeared on the trial, as the bill of exceptions shows, that the lot in controversy once belonged to Price Williams, who, on the 15th September, 1854, sold and conveyed it to said John Ives; taking his notes for the purchase-money, with a mortgage on the lot to secure their payment. This mortgage, which was in the usual form, was duly recorded; but the deed from Williams to Ives never was recorded. Williams, who was introduced as a witness by the plaintiff, testified, "that about the 12th December, 1854, according to his best recollection, said Ives came to him, and said, that he was unable to pay the purchase-money for said lot, but had a friend, one Thomas Condon, who would pay it, and requested witness to make a deed to said Condon, in trust for his (Ives') wife, and that he would surrender or destroy his deed; that he (witness) consented to do this, and went with said Ives down to the premises, where they found Condon and Mrs. Ives; that the money was there paid to him, either by Condon, Ives, or Ives' wife, and his deed to Ives was thereupon torn to pieces and destroyed, either by Ives himself, or by witness at his instance, he could not remember which; and that he then made a deed to said Condon, as trustee for Mrs. Ives and her children, and dated it as of the 15th September, 1854."

"The court charged the jury, among other things, that if the deed from Williams to Ives was never recorded, and was intentionally destroyed by Ives, or at his instance, with a view of having a conveyance made to another party; and if Williams afterwards made a conveyance to Condon, at the instance of Ives, in trust for Ives' wife,—then Ives would be estopped from gainsaying Condon's

title; and if the land was afterwards sold under execution against Ives, the purchaser at the sale would occupy no better position than Ives; and that a title thus acquired could not, at law, prevail against the title of the defendant, if he purchased Condon's title without notice of the circumstances under which Williams' deed to Ives had been destroyed."

This charge, with other matters to which exceptions were reserved by the plaintiff, is now assigned as error.

L. L. LUDE, for appellant.

A. J. WALKER, C. J.—Williams, by deed, conveyed the land in controversy to Ives, and took a mortgage of the land conveyed, to secure the payment of the purchase-money. The mortgage was recorded, but the deed was not. Subsequently, the deed was destroyed; the purchase-money was paid; and Williams, with the consent of Ives, conveyed to Condon, as a trustee for the wife of Ives and her children. After this conveyance to Condon, the land was sold under execution against Ives, and purchased by Gimon, the plaintiff, who took the sheriff's deed, and had it recorded. Subsequently, Condon, having a power of sale conferred upon him by the deed of trust, conveyed to the defendant, Davis, and Ives and his wife joined in the conveyance.

[1-2.] The destruction of the deed from Williams to Ives did not re-invest Williams with the legal title.—*King v. Crocheron*, 14 Ala. 822; *Mallory v. Stodder*, 6 Ala. 801. An estoppel resting in parol can have no effect upon the title to land, in a trial at law. We may, therefore, exclude from our view, in the investigation of the material question of title, the matter of the destruction of the deed, and also of the supposed estoppel, which seem to have been discussed in the court below.

[3] Did Gimon, the plaintiff, claiming under the prior unregistered deed from Williams to Ives, and a sheriff's sale of the land as the property of Ives, have a better title than Davis, who claimed under the deed of Williams to Condon as trustee, and the deed of Condon and Ives and

the wife of Ives? Gimon's title, derived from Williams, was older than that of Davis, and better, unless Gimon is postponed to Davis, on account of the want of registration of Williams' deed to Ives, under which he claimed. Our statute declares an unregistered deed void, as against a subsequent purchaser for valuable consideration without notice.—Code, § 1287. Under this statute, Davis, holding under the later deed of Williams, has a better title than Gimon, holding under the prior unregistered deed, if Davis is a purchaser for valuable consideration without notice. Davis is, in the eye of the law, affected with notice of the conveyance of Williams to Ives, under which Gimon claims. He is affected with such notice, because Ives joined with his wife and Condon in the conveyance to Davis, and was, therefore, a grantor of Davis; and being such grantor, Davis is bound to take notice of the registered mortgage of Ives to Williams, and the notice of the mortgage to Williams was sufficient to put him upon inquiry, and lead him to a knowledge of the deed from Williams to Ives.

It is admitted, that if Davis did not hold under Ives and if Ives were entirely outside of his chain of title, he would not be affected with notice of the mortgage; for the registration of a mortgage is, as we think, notice only to those who hold under the mortgagor. —*Pierce v. Taylor*, 23 Maine, 246; *Veazie v. Parker*, *ib.* 178; *Roberts v. Bourne*, *ib.* 165; *Fenno v. Sayre & Converse*, 3 Ala. 458, 472; *Whittington v. Wright*, 9 Geo. 23; *Stuyvessant v. Hall*, 2 Barb. Ch. 151, 157; *N. Y. Life Ins. & Trust Co. v. Smith*, *ib.* 82; *Raynor v. Wilson*, 6 Hill, 469; *Lieby v. Wolf*, 10 Ohio, 83; *Halstead v. Bk. of Kentucky*, 4 J. J. Mar. 558; *Murray v. Ballou*, 1 Johns. Ch. 566; *Bates v. Norcross*, 14 Pick. 224, 231; *Felton v. Pitman*, 14 Geo. 53.

In the case of *Center v. P. & M. Bank*, (22 Ala. 743,) there is an unguarded remark, not at all necessary in the decision of the case, which would seem to convey the idea, that one purchasing from a mortgagee would be deemed to have notice of the mortgage, if registered, because it would be his duty to examine the books of registration for such mortgage. But the obvious purpose of the regis-

Gimon v. Davis,

tration laws, as indicated in the decisions above cited, is to protect innocent purchasers and creditors without notice, by preventing prejudice to them from prior unrecorded conveyances, made by those under whom they claim; and they are only required to examine the books of registration for conveyances by those under whom they claim. If Davis, therefore, traced his title from Williams through Condon and the wife of Ives alone, he would not be affected with notice of the mortgage of Ives to Williams. But he holds by a direct conveyance, in which Ives is one of the grantors; and he must be regarded as having notice of the registered mortgage by his grantor to Williams.—See the cases above cited; also, *Reed v. Smith*, 14 Ala. 380. The mortgage given by Ives to Williams, and accepted by the latter, was sufficient to put Davis upon inquiry as to the title of Ives; and he must be deemed to have had notice of the deed from Williams to Ives.—*Drapers' Co. v. Yardley*, 2 Ver. 662; 2 Sug. on Ven. 559; 1 Story's Eq. Ju. § 400. Davis, being a purchaser with notice of Williams' prior conveyance to Ives, must be postponed to Gimon, as a claimant of title under Williams.

If we contrast the merits of their titles as derived from, and traced back no further than to Ives, we find Gimon's title still sustained. Gimon's deed from the sheriff, who sold the land as the property of Ives, was made, and duly recorded, before the deed from Ives and his wife and Condon to Davis was executed.

It is unnecessary for us to consider any other question in the case. Upon the case made by the bill of exceptions, the court should have charged the jury, that if they believed the evidence, they should find for the plaintiff.

Judgment reversed, and cause remanded.

McGUIRE vs. WESTMORELAND.

[BILL IN EQUITY FOR PARTITION OF SLAVES.]

1. *Gift to "children" held not to include grand-children.*—Under a deed of gift, by which slaves are conveyed to a trustee, in trust for the sole and separate use of the grantor's married daughter during coverture, and, "upon the dissolution of said marriage," to be conveyed by the trustee "to the present and future children, the offspring of said marriage, that may be living at the time of the happening of said dissolution of marriage,"—grand-children, whose parent was living at the time the deed was executed, but died before the dissolution of the said marriage, take no interest.

APPEAL from the Chancery Court of Lauderdale.

Heard before the Hon. JOHN FOSTER.

THE bill in this case was filed by the children and heirs-at-law of Frances A. McGuire and Sarah J. Briggs, both deceased, infants suing by their next friends, against the surviving brothers and sisters of said Frances and Sarah; and sought a partition of certain slaves, in which the complainants claimed an interest under a deed of gift from Robert Mitchell, their maternal great-grandfather. Said deed of gift, which was made an exhibit to the bill, was dated the 1st October, 1842, and conveyed a negro woman and her two children, (who, with their increase, are the subject of this suit,) in consideration of the grantor's natural love and affection for his daughter, Lucy Westmoreland, then the wife of Edwin B. Westmoreland, to Albert G. Westmoreland as trustee, upon the following trusts: "that the said Lucy Westmoreland, the party of the third part, is to have the sole use and enjoyment of said slaves as her separate property, free from the control of her said husband, so long as the marriage shall subsist between herself and her said husband; and upon this further trust, that upon the dissolution of said marriage, either by act of law or God, then the said party of the second part [the trustee] convey said slaves, with the future in-

crease of the females, absolutely, to the present and future children, the offspring of the said marriage between said Edwin B. and Lucy Westmoreland, that may be living at the time of the happening of such dissolution of marriage." The bill alleged, that said Frances A. McGuire and Sarah J. Briggs were children of said Lucy and Edwin B. Westmoreland, and were living at the time said deed of gift was executed; that said Sarah died in September, 1849, and said Frances in January, 1851; that said marriage between Edwin B. and Lucy Westmoreland was dissolved, by the death of said Edwin, in September, 1856; and that the trustee, disregarding the rights of the complainants, afterwards conveyed the slaves to the defendants. The chancellor sustained a demurrer to the bill, for want of equity, and his decree is now assigned as error.

W. B. Wood, for appellants, cited 2 Sim. 320, 326; 4 Vesey, 437; 10 Vesey, 196; 1 Vesey, 196; 2 Dess. 123, note; 1 Dess. 324, 137; 7 Paige, 328, 339; 2 Sneed, 5; 12 Ala. 135; 1 Roper on Legacies, 46.

JNO. S. & E. W. KENNEDY, *contra.*, cited 2 Jarman on Wills, 51-57; 2 Williams on Executors, 934-35; 1 Dev. & Bat. 393; 3 Vesey, 289; 2 McCord's Ch. 440; 4 Paige, 47; 3 Mason, 594; 4 Watts, 82; 2 Swan, 318; 17 Ala. 617; 19 Ala. 348; 3 Porter, 452.

STONE, J.—The word *children*, in its general signification, includes only those persons who are descended from an ancestor, or *propositus*, in the first degree. There are two classes of cases, in which the word *children*, in a devise or bequest, will be construed to include grandchildren: 1st, from necessity—where the will would remain inoperative, unless the sense of the word "*children*" were extended beyond its natural import; and, 2d, where the testator has clearly shown that he did not intend to use the term *children* in its proper and actual meaning, but in a more extensive sense.—*Morris v. Owen*, 2 Call, 520; *Phillips v. Beall*, 9 Dana, 1; *Mowatt v. Carow*,

7 Paige, 328; Cutter v. Doughty, 23 Wendell, 513; Stubs v. Stubs, 11 Humph. 43; Dickinson v. Lee, 4 Watts, 82; 2 Williams on Executors, 935; 1 Roper on Legacies, 68.

In the present case, the language employed does not convey the idea, that the testator used the word *children* in any other than its ordinary sense. The time when the children are to take, is fixed at the dissolution of the marriage, either by death or otherwise, between Edwin B. and Lucy Westmoreland. The persons who are to take, are the present and future children of said parties, who *may be living* at the dissolution of said marriage. The words, "*the offspring of,*" do not enlarge the meaning of the word *children*. They are synonymous with *born of*, or *the fruit of*; and can have no other effect than to make more definite the persons who are described as children—namely, those who are the fruit, the offspring, of Edwin B. and Lucy Westmoreland. We find nothing in this deed, which authorizes us to give to the word *children* the more enlarged meaning, so as to include grand-children. McCroan v. Pope, 17 Ala. 612; Johnson v. Culbreath, 19 Ala. 348; Scott v. Nelson, 3 Porter, 452.

Decree of the chancellor affirmed, at the costs of the appellants' next friends.

R. W. WALKER, J., not sitting.

LEDLOW vs. BECTON.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Promise held original, and not within statute of frauds.*—Where the defendant, a widow, before the grant of administration on the estate of her deceased husband, "verbally instructed or requested plaintiff or one of his clerks to let one S., a man in the employment of the estate, have out of plaintiff's store whatever articles he want-

ed, and that the estate would pay it,"—*held*, that the promise was an original undertaking, not within the statute of frauds, and was binding on the defendant personally, on proof that the goods were furnished on the faith of it, although charged on plaintiff's books to the estate, and that the administrator refused to pay for them.

APPEAL from the Circuit Court of Tuskaloosa.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Frederic L. Becton, against Mrs. Rebecca Ledlow, to recover the amount of an open account for goods, wares and merchandise, sold and delivered during the year 1857. The defendant pleaded the general issue, payment, set-off, and the statute of frauds; and issue was joined on all these pleas. On the trial, as the bill of exceptions states, the plaintiff read in evidence the account on which the suit was founded, and then introduced his clerk as a witness, who testified, "that the defendant, who was the widow of Lewis Ledlow, deceased, shortly after the death of her said husband, and before an administrator on his estate had been appointed, verbally instructed or requested plaintiff or some one of his clerks to let one Sheridan, a man in the employment of the estate, have out of plaintiff's store whatever articles he wanted, and that the estate would pay it; that said Sheridan afterwards got the large part of the goods composing said account, which, for convenience merely, were charged on plaintiff's books to the estate of said Lewis Ledlow; and that in the items of said account there were eleven dollars' worth of goods got by defendant on her own account, and which had been charged to her individually on plaintiff's books. The defendant then read in evidence two copies of the said account, one of which had been presented to her for payment, and the other to one Clark, the administrator of said Lewis Ledlow's estate, (and which said administrator refused to pay;) each of which accounts appeared to have been made out against the estate of said Lewis Ledlow, and not against the defendant. The defendant also read to the jury, without objection, a letter addressed to her in plaintiff's name, by his clerk, dated the 20th February, 1859, as follows:—

'Dear Madam—Mr. Clark settled with us the account against your late husband, but did not feel himself authorized to pay the estate account, as there were charges for articles delivered to Mr. Sheridan. You will recollect instructing Mr. J. J. Porter, one of my young men, to let Mr. Sheridan have any articles he should wish during the year, and the estate would be good for the same. Accordingly, the account was continued the same as before your husband's death. Please direct the administrator to pay the account, as follows: Estate, \$91 28; Mrs. R. Ledlow, \$11 52—\$102 80, with interest from 1st January last.'

"Upon this state of facts, the court charged the jury, that if they believed the instructions were given by defendant to plaintiff as shown in the evidence, and that there was no administrator or executor of said Lewis Ledlow's estate at the time said instructions were given, and that the defendant never had any authority to buy or order goods for the estate, and that the credit was given, on account of said instructions, to the defendant,—then they must find for the plaintiff. To this charge the defendant excepted," and she now assigns it as error.

WM. R. SMITH, for appellant.

VAN HOOSE & POWELL, *contra*.

R. W. WALKER, J.—The contract in this case was not within the statute of frauds, because there was no undertaking to answer for the debt or default of another. It is not pretended that the estate was liable for the goods sold; and a promise cannot be collateral, unless there be some one who owes the debt directly.—*Sanford v. Howard*, 29 Ala. 691; 2 Pars. Contr. 301. It is well settled, that where one assumes to act as agent for another, without having authority for that purpose, he will be personally responsible to the person with whom he deals.—*Story on Ag.* § 264; *Lazarus v. Shearer*, 2 Ala. 725; *Howard v. Humes*, 9 Ala. 661. It is said, however, that this principle has no application to this case, for the reason that the defendant did no act which could have led the plain-

tiff to suppose that she was the agent of, or had authority to bind the estate; and that from the circumstances, as disclosed by the record, the plaintiff must have known at the time that the defendant was not such agent.—Story on Ag. § 265. We may admit that this is so; still we do not perceive that the concession can aid the appellant. If goods are delivered to A, by the direction, and on the credit of B, and under his promise (made without authority) that C will pay for them, B is certainly liable if C refuses to pay, although the party selling the goods may have known that B had no authority to bind C. Whether the express refusal of C to pay would be necessary to perfect the liability of B, it is not necessary to determine. If the facts were as supposed in the charge, the goods were furnished to Sheridan, by the direction, and on the credit of the defendant, under a promise by her that the estate would pay or be good for the same. It appears to have been an undisputed fact in the case, that the account had been presented to the administrator of the estate, and that he had refused to pay it. On the hypothesis that the jury found the facts to be as supposed in the charge, the case falls directly within the principle above stated, and the liability of the defendant is clear. The mere fact that the goods were charged to the estate, is not conclusive evidence that they were sold on the credit of the estate. The court properly left it to the jury to determine, from all the circumstances, whether the credit was or was not given to the defendant.—*Scott v. Myatt & Moore*, 24 Ala. p. 493.

Judgment affirmed.

LENOIR'S ADM'R vs. WILSON.

[TRESPASS FOR INJURIES TO PERSONAL PROPERTY.]

1. *Plea of former recovery by plaintiff as claimant in trial of right of property.*—A judgment for the claimant, in a trial of the right of property under the statute, is not a bar to a subsequent action by him to recover damages for the tortious taking of his property under the execution.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Jack R. Wilson, against James Odom, as the administrator of Robert Lenoir, deceased, to recover damages for the tortious act of the defendant's intestate, in procuring an execution, which was issued on a judgment in favor of Lewis F. Lenoir, against one John R. Wilson, to be levied on certain spars belonging to the plaintiff. The defendant interposed a special plea, in these words: "For further plea he says, that the spars described in the plaintiff's complaint were seized and levied on by the sheriff of Mobile county, by virtue of an execution issued from the circuit court of Clarke county, on a judgment in favor of Lewis F. Lenoir, against one John R. Wilson; that said levy and seizure was made by said sheriff on said spars, as the property of said John R. Wilson, on the 28th April, 1855; that on the 4th May, 1855, said plaintiff interposed a claim to said spars as his property, and made the oath required by law, and gave bond, with security, to try the right of property in and to said spars, and the same were thereupon delivered to him; that afterwards, to-wit, on the 10th day of January, 1856, in said circuit court of Mobile county, said claim was tried, and the jury rendered a verdict that said spars were not liable to said execution; whereupon it was adjudged, that said spars were not liable to said execution, and that the claimant go hence, and recover of the plain-

tiff, said Lewis F. Lenoir, his costs. And this defendant now pleads the interposition and trial of said claim to said spars, and the proceedings thereon and thereby, in bar of this suit." The court below sustained a demurrer to this plea, and its judgment on the demurrer is now assigned as error.

DARGAN & TAYLOR, for appellant.—When an execution against one person is levied on the goods of another, the latter may, at his election, either pursue his common-law remedies, or resort to a statutory claim suit; but he can not maintain both. A judgment in his favor in either form of action, with satisfaction thereof, is a bar to the other action. The cause of action in each case is the same—the levy of the execution; and the rule is settled, that a single cause of action can not be split up into two or more actions.—O'Neal v. Brown, 21 Ala. 482, and cases there cited. A trial of the right of property is a suit at law, and is attended with the usual consequences of a suit; and it has been decided in this court, that a verdict in favor of the claimant is conclusive of the question of title.—Roberts v. Heim, 27 Ala. 678.

WM. BOYLES, with TORREY & LESLIE, *contra*.—A statutory claim suit is not an action by the claimant, but a proceeding *in rem* by the plaintiff in execution, to subject the property to the payment of his debt. A judgment in favor of the claimant simply effects a restoration of the property, and goes to mitigate the damages in a personal action for the trespass.—Ewing v. Blount, 20 Ala. 694; Leavitt v. Smith, 7 Ala. 182. In Roberts v. Heim, 27 Ala. 678, although the point was not directly decided, an action for the tort was sustained after a verdict for the claimant on the trial of the right of property.

A. J. WALKER, C. J.—The question presented by the demurrer to the appellant's plea is, whether a judgment in favor of the claimant, on a trial of the right of property, is a bar to an action for the tort committed by taking the property under the execution. The argument in favor of

the sufficiency of the plea is, that the tort gives rise to an indivisible cause of action, embracing the right to recover the property; and that the plaintiff can not split up the cause of action, and recover the property itself in a trial of the right of property, and afterwards recover in this action for the injuries which were not redressed by the restoration of the property. It is undoubtedly a rule of law, "that a demand, not divisible in its nature, can not be split up into several causes of action;" and that a judgment, in a suit for a part of a cause of action, is a bar to a suit for the remainder.—*Oliver v. Holt*, 11 Ala. 574. From this principle it seems to result, that if a trial of the right of property is a suit to recover for any part of the cause of action accruing to the claimant in consequence of the tortious taking of the property, he would be barred, after a judgment in that proceeding favorable to him, from maintaining this action. The sufficiency of the plea, therefore, depends upon the question, whether the claimant in a trial of the right of property, who succeeds, recovers for a part of the cause of action resulting from the tort.

In the trial of the right of property, the claimant is not the plaintiff: on the contrary, he is the defendant. Hence it has been decided, that the plaintiff in execution, who is proceeding in chancery for the subjection of the same property to his debt, may be compelled to elect between his remedy at law and in chancery, and compelled to abandon one or the other.—*Pl. & M. Bank v. Borland*, 5 Ala. 531; *Pl. & M. Bank v. Walker*, 7 Ala. 926. Hence it is, also, that, under the old law, the plaintiff in execution was required to give security for costs.—*McAdams v. Beard & Henderson*, 34 Ala. 478; *Jacott v. Hobson*, 11 Ala. 434. It is true that the suit originates by the act of the claimant, when he makes the bond and affidavit. *Wiswall v. Gliddon*, 4 Ala. 357; *McAdams v. Beard & Henderson*, *supra*.

The trial of the right of property is an anomalous proceeding, initiated by the claimant, and in which the plaintiff in execution is the actor, or plaintiff. When the property of one is levied on, by virtue of an execution

against another, the statute gives to the owner the privilege of arresting the proceeding under execution against his property, upon making the prescribed bond and affidavit, until the plaintiff shall obtain a judicial ascertainment of the liability of the property to the execution. It arms the claimant with the right of compelling the plaintiff in execution to suspend the proceeding under execution against the property, and become the plaintiff in a statutory suit, in which he affirms the liability of the property to his execution; and that he should maintain his side of the issue, before he can obtain a sale of the property. The claimant does not, by originating the trial of the right of property, seek or obtain redress for the injury done by the trespass; but simply, in the exercise of a privilege given him by the statute, throws upon the plaintiff the *onus* of maintaining the liability of the property in a judicial proceeding, before he can obtain a sale of it under execution. The object of the law is to throw around the plaintiff's proceeding under his execution a safeguard against unnecessary injury, not to give redress to the claimant for the injury done to him by committing the trespass. The law says to the plaintiff, that the bond and affidavit having been made by the claimant, he can not proceed further with his execution against the particular property, until he obtains a judgment of condemnation. The object of the suit is to remove the obstacle in the way of the proceeding against the property, and to establish its liability. The redress of the past wrongs to the claimant is not the purpose. The trial of the right of property is not a suit upon any part of the claimant's cause of action resulting from the trespass, and a judgment in favor of the claimant could not bar a subsequent suit for damages.

The opinion of this court in *Roberts v. Heim*, 27 Ala. 678, indicates that the same view of this question was taken then by the court, though the point is not expressly decided.

It is true that, as an incident to the proceeding for the trial of the right of property, the claimant obtains a restoration of his property; but this restoration results from

the fact, that he has given a security deemed by the law a full equivalent. The property is not recovered by suit, and its obtainment is not the result of any judgment. We can not perceive any difference between the effect of such a restoration, and a restoration voluntarily made. The effect of a voluntary restoration is to lessen the damages, not to defeat the suit.—Ewing v. Blount, 20 Ala. 694.

Judgment affirmed.

DOW vs. WHITMAN & OUSLEY.

[ACTION AGAINST NON-RESIDENT, COMMENCED BY ATTACHMENT.]

1. *Amendment of judgment nunc pro tunc pending appeal.*—When a judgment is amended *nunc pro tunc* during the pendency of an appeal, and the amendment brought up on *certiorari* previously sued out, the amended judgment is properly before the appellate court.
2. *Want of affidavit not available on error.*—In an action against a non-resident, commenced by attachment, the want of the statutory affidavit, or the failure of the record to set out the affidavit if made, (Code, §§2561-62,) is not available on error, after judgment by default.
3. *Publication against non-resident.*—A recital in the judgment, that "publication was made giving defendant notice according to law," (Code, §2510,) is not sufficient, on appeal, to sustain a judgment by default against a non-resident.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by Whitman & Ousley, as partners, against Lorenzo Dow; was founded on the defendant's promissory note for \$100, dated the 13th September, 1856, payable on the 15th October next after date, to the order of J. T. Norman, and transferred by said Norman to plaintiffs; and was commenced by original attachment, sued out before a justice of the peace, on the

30th March, 1858. The attachment recites, that oath was made before the justice that the defendant was a non-resident; but the clerk certifies that no affidavit was ever filed in his office. The attachment was executed, by summoning James Harrison and Leroy Gresham as garnishees. At the spring term, 1858, the garnishees answered, admitting an indebtedness to the defendant in attachment; and, at the same term, publication was ordered against said defendant, as a non-resident. At the next ensuing term, a judgment by default, in the usual form, was rendered against the defendant; but the record does not show that any final judgment was rendered against the garnishees. From this judgment, on the 25th May, 1859, the defendant sued out an appeal to this court. At the June term, 1859, to which the appeal was returnable, a *certiorari* was awarded, on motion of the appellees; and the *certiorari* was issued on the 1st October, 1859. At the fall term, 1859, of the circuit court, on motion of the plaintiffs, the judgment was amended *nunc pro tunc*, as of the fall term, 1858, by inserting the following words: "And it appearing to the satisfaction of the court, by proof, that publication was made giving defendant notice, according to law, of the pendency of this suit," etc.; and this amended judgment was sent up by the clerk in his return to the *certiorari*. It was assigned for error, (among other things,) that the court erred in the rendition of judgment against the defendant, because the attachment was issued without the statutory affidavit, and because the proof of publication was not sufficient.

THOS. WILLIAMS, for appellant.

CLEMENTS & WILLIAMSON, *contra*.

STONE, J.—The amended judgment is properly before us on this appeal, and must be regarded as the judgment in the cause. We content ourselves with a citation of the authorities.—Cunningham v. Fontaine, 25 Ala. 644; Farmer v. Wilson, 34 Ala. 75; Moore v. Horn, 5 Ala. 234.

[2.] The objection, that the record does not contain the

affidavit on which the attachment was sued out, is not well taken.—Code, §§ 2561, 2562; Jones v. Pope, 6 Ala. 154; Kirkman v. Patton, 19 Ala. 32.

[3.] This case coming up on appeal, the recital in the amended judgment entry, "that publication was made giving defendant notice according to law," was not a sufficient compliance with the statute.—Code, § 2510. The recital should show that the publication was made for four consecutive weeks, giving notice of the attachment and levy.—Keiffer v. Barney, 31 Ala. 193; Butler v. Butler, 11 Ala. 668; Hartley v. Bloodgood, 16 Ala. 233; Cullum v. Branch Bank, 23 Ala. 797.

Reversed and remanded.

RAGLAND vs. CALHOUN'S ADM'R.

[SUPERSEDEAS OF FI. FA. AGAINST ADMINISTRATOR'S SURETIES.]

1. *Statute of limitations against sheriff's sureties.*—The act of 1832, prescribing six years as the period within which an action must be commenced against the sureties of public officers for the default of their principal, (Clay's Digest, 329, § 90.) does not apply to a summary proceeding against the sureties of a sheriff on his official bond, for the default of their principal as administrator by virtue of his office as sheriff.
2. *Conclusiveness of probate decree.*—A decree of the probate court against an administrator, under his appointment by virtue of his office of sheriff, concludes the sureties on his official bond as sheriff from contesting, before that court, their liability for the default ascertained by the decree, on the ground that, after the expiration of their principal's term of office as sheriff, he was appointed administrator *de bonis non* in his individual capacity, and gave bond with new sureties, who thereby became liable for his previous default.

APPEAL from the Probate Court of Talladega.

THE appellants in this case were the sureties of Solomon Spence, on his official bond as sheriff of Talladega county, dated the 7th February, 1842. On the 17th March, 1842, letters of administration *de bonis non* on the estate of John C. Calhoun, deceased, were granted to said Spence, by virtue of his office of sheriff. On the 6th May, 1845, after the expiration of his term of office as sheriff, said Spence was appointed, on his individual application, administrator *de bonis non* of said decedent; and thereupon gave a new bond, as such administrator, with different sureties. On the 1st September, 1846, said administrator was required to give additional security; and on his failure to do so, his letters were revoked on the 7th September, 1846, and the administration of the estate was committed to William Easley, by virtue of his office as sheriff. On the 23d December, 1848, after the expiration of Easley's term of office, letters of administration on said estate were granted to Joseph N. Savery, by virtue of his office as coroner of the county. On the 14th May, 1855, on final settlement of said Spence's accounts as administrator, under his first appointment by virtue of his office of sheriff, a decree was rendered against him by said probate court, in favor of said Joseph N. Savery, as succeeding administrator, for \$5,686 38. An execution on this decree, against Spence alone, having been returned "no property found," an execution was issued on the 10th September, 1855, against him and the sureties on his official bond as sheriff, and, on the 31st March, 1858, an *alias*. This last execution having been levied on property belonging to the sureties, they thereupon filed a petition for a *supersedeas* in the probate court; alleging, in addition to the facts above stated, that said Spence, up to the time of his individual appointment as administrator of said estate, was never required to settle his former official administration, and had never refused to do so; and that he was then, and for a long time afterwards continued to be, fully able to account for all the assets which he had received; insisting that, upon these facts, all liability for the assets received by him under his first administration was transferred from the sureties on his official bond as sheriff, to

the sureties on his new bond as administrator in his individual capacity; and pleading the statute of limitations of six years, as a bar to the proceeding against them. A transcript from the records of the probate court, showing all the proceedings had in the matter of said intestate's estate, was made an exhibit to the petition. The plaintiff in execution demurred to the petition—"1st, because the statute of limitations of six years is no bar to the plaintiff's right to collect this money; 2d, because the petition does not aver that Spence, when he was appointed administrator in his individual capacity, had in his possession, unconverted to his own use, the assets of said estate; 3d, because the administration having once attached to the office of sheriff, the orphan's court had no authority to detach it, unless the record shows one of the facts on which the statute gave the authority; and, 4th, because the facts set forth in said petition are not, in law, sufficient to authorize the court to quash said execution." The probate court sustained the demurrer, and dismissed the petition; and its ruling is here assigned as error.

JAS. B. MARTIN, for appellants.

ALEX. & JNO. WHITE, *contra*.

R. W. WALKER, J.—The act of 1821 provided for the grant of administration to the sheriff or coroner of the county, where no other administrator had qualified, or where the administration had become vacant by death, removal or resignation; and enacted that, in such case, "unless the judge shall otherwise order, no other oath, bond or security, shall be necessary to be given, than the bond and oath of office already taken and given by such sheriff or coroner; but, on his bond for the performance of the duties of his office, he and his securities shall be liable for his administration, and such bond may be sued, and judgment from time to time recovered thereon, in the same manner as is or may be provided by law in case of other bonds of executors, administrators and guardians."—Olay's Digest, 222, § 10. By the act of 1822 it was provided, that the act of 1821, above recited, "shall be taken and

strictly construed, so as to attach the administration to the offices of sheriff or coroner, and not to the person."—Clay's Digest, 223, § 10. The act of 1832 declares, that "no action, suit, or motion, shall be maintained against the security or securities of any sheriff, constable, or other public officer of this State, for any misfeasance, malfeasance, or other cause whatever, hereafter committed, unless the same be commenced or prosecuted within six years next after the commission of the act complained of."—Clay's Digest, § 29, § 90.

Spence was, by virtue of his office of sheriff, appointed administrator *de bonis non*, in March, 1842. His term of office, and with it his administration under the appointment just referred to, expired in March, 1845. This proceeding against the petitioners, who were his sureties on his official bond as sheriff, and as such bound for his acts as administrator *de bonis non* by virtue of his office, was not instituted until more than six years after the termination of his administration. The petitioners now invoke the protection of the special statute of 1832, above cited; and the question is, whether the limitation provided by that act applies to a default committed by a sheriff as administrator, when he has been appointed such administrator in his capacity of sheriff, and has qualified and acted as such under his general official bond.

If the statute does apply to such a case, the result produced is certainly a singular one. Under the act of 1821, when a sheriff is appointed administrator *virtute officii*, the court may require him to execute a special administration bond, or may permit him to qualify and act as administrator under his official bond as sheriff. The effect of the statute is, that when the latter course is adopted, the official bond becomes an administration bond, and the sheriff and his sureties are liable upon it, to the same extent as if they had executed an administration bond proper, under an order of the court.—See *Gov. v. Davis*, 9 Ala. 918. If the court should require the sheriff to execute a special administration bond, there can be no doubt that he and his sureties on such bond would be liable to the summary remedy provided by the act of 1832, (Clay's Di-

gest, 305, § 45;) and that this liability would be wholly uninfluenced by the statute of limitations of six years. If this be true, and if it also be true that the official bond of a sheriff, when appointed administrator by virtue of his office, becomes an administration bond for the purposes of such administration—that in fact the one bond is but a substitute for the other—it would seem to follow, that the sureties should be liable to the same remedies in the one case as in the other; and it would look like defeating the purposes of the statute, were we to hold that, while the statute of limitations affords no protection to the sureties on a special administration bond, it should operate a complete bar in favor of the sureties on the official bond, which is but a substitute for an administration bond proper.

Moreover, the whole frame and phraseology of the act of 1832 point, as it seems to us, to official defaults, and not to omissions of duty by an administrator. The act provided, that if the claim be in favor of an infant, or person *non compos mentis*, &c., the suit might be brought within three years after the termination of the disability; and by the 2d section it was provided, that for any malfeasance, misfeasance, or other cause of action, *therefore* committed by any sheriff, &c., no suit, &c., should be maintained against his sureties, unless commenced within three years after the passage of that act.—Clay's Digest, 329, § 91. Now, so far as the probate and circuit courts are concerned, no suit can, in the first instance, be maintained against the sureties of an administrator. The default and liability of their principal must be ascertained and fixed, before there can be any proceedings against them. Considering the delays which frequently attend litigation, it is scarcely presumable that the legislature would have prescribed a three-years bar in this class of cases, to persons who had been disabled from bringing suit, or to those who complained of defaults committed before the statute was enacted. The statute, thus construed, would certainly be a hard one; for it would operate a bar in favor of the sureties, at the end of three years, when possibly, with his best diligence, the claimant could not,

within that time, place himself in a condition to commence proceedings against them.

Our conclusion on this branch of the case is, that the statute of limitations affords no protection to the petitioners.

2. The petition alleges, that Spence's term of office as sheriff, and with it his administration by virtue thereof, expired in March, 1845; that on 6th May, 1845, he was, upon his own application, appointed administrator *de bonis non* in his *individual capacity*, and gave a new bond, with a different set of sureties from those who were on his official bond as sheriff; that until after his second appointment, he had never been called upon to settle his administration, and had never refused to do so; and that from the time of his appointment as administrator *virtute officii*, until long after his appointment in his individual capacity, he was fully able at all times to have accounted for the assets he may have received. It is insisted, that Spence's second appointment in 1845, and the execution of his bond, and his qualification under that appointment, operated a transfer of the assets then on hand, to his second administration, and a consequent discharge of the sureties for the first administration from liability therefor; and that from the passage of the act of 4th February, 1846, (Acts '45-6, p. 14,) by which an administrator *de bonis non* was authorized to call the previous administrator to account for all assets which had been received and converted by him, if not from the date of the second appointment, the sureties upon his bond as sheriff were also discharged from any liability incurred for *devastavit* committed during the first administration.

The principle on which this proposition is sought to be maintained is, that where a debt and credit—a right to demand, and an obligation to pay—co-exist, even for a moment, in the same person, the debt is extinguished by presumption of its payment. The argument is, that if the second administration had been conferred upon a stranger, he would have been at once entitled to receive from Spence all unadministered assets on hand; and that after the passage of the act of 4th February, 1846, he could

have called Spence to a full account of his administration; that when the second administration was conferred, not upon a stranger, but upon Spence, the former administrator, he became entitled, in his new capacity, to a transfer of the unadministered assets; that on the passage of the act of 1846, he became entitled to an account of the past administration; and being thus both debtor and creditor, and incapable by recognized legal process of suing himself, or obtaining this account and transfer, the same results were produced by *operation of law*; and Spence, as administrator by virtue of his office, and his sureties for that administration, were discharged from all liability on account thereof, and a corresponding liability substituted in Spence as administrator in his individual capacity, and his sureties under this second appointment.—See *Enicks v. Powell*, 2 Strob. Eq. 196, 205-6-7; also, *Trimmier v. Trial*, 2 Bailey's Law R. 486-7; *Joyner v. Cooper*, *ib.* 199; *Simkins v. Cobb*, *ib.* 60, 65.

Whatever may be the ultimate decision of the interesting question here suggested,—which we leave open to be decided when it arises, not intending by anything we have said to intimate an opinion the one way or the other,—it can be of no avail to these petitioners, for the reason, that the probate court has, by its decree, determined that Spence was liable for the amount thereof, in his capacity as administrator *de bonis non* by virtue of his office of sheriff; and that his securities are concluded by that decree. It is too well settled in this State to be any longer the subject of controversy, that, in the absence of fraud, the sureties of an administrator are concluded by a final settlement of their principal in the probate court.—*Lamkin v. Heyer*, 19 Ala. 228, 233; *Williamson v. Howell*, 4 Ala. 693; *Slatter v. Glover*, 14 Ala. 648; *McLure v. Colclough*, 5 Ala. 69; *Watts v. Gayle*, 20 Ala. 817; *Perkins v. Moore*, 16 Ala. 16. It is shown by the record from the probate court, which is attached as an exhibit to the petition, that the proceeding which led to the decree against Spence, was a proceeding for the final settlement of his accounts as administrator *de bonis non* by virtue of his office of sheriff, under the appointment made in March,

1842; and the decree which was rendered by the court is against "Solomon Spence, late sheriff of Talladega county, and as *such* administrator *de bonis non*," &c. The settlement made was, upon its face, a settlement of the first administration, for which the petitioners were sureties. If, by reason of his second appointment and qualification, Spence was, in his capacity as administrator *de bonis non* by virtue of his office, discharged from the sum charged against him in the account stated by the probate court, he could have shown this fact on the final settlement, and protected himself from the decree which was rendered. This he did not do, and his failure is conclusive alike on him and his sureties. The question cannot be again litigated in the probate court; for that would be to upset the entire settlement, for the mere purpose of contesting a fact, which could have been tried at the final settlement. The defense insisted on is, that Spence was liable for the assets of this estate under his second administration, and not his first. But the decree of the court ascertains that he was liable for them under his first appointment; and that decree concludes alike him and his sureties.—*Lamkin v. Heyer*, 19 Ala. 232; *Williamson v. Howell*, 4 Ala. 693; *Slatter v. Glover*, 14 Ala. 648; *McLure v. Colelough*, 5 Ala. 69, 70; *Spence v. Savery*, 25 Ala. 731.

Decree affirmed.

A. J. WALKER, C. J., not sitting.

MARSHALL COUNTY *vs.* JACKSON COUNTY.

[ACTION AGAINST COUNTY ON CLAIM ALLOWED BY COMMISSIONERS' COURT.]

1. *Action does not lie.*—Under the provisions of the Code, (§§ 763, 775, 2141,) an action does not lie against a county, on a claim which has been allowed by the commissioners' court.

Marshall County v. Jackson County.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. S. D. HALE.

The complaint in this case was as follows :

“The County of Jackson } The plaintiff claims of the
 vs. } defendant three hundred and
 The County of Marshall. } fifty-eight dollars, due to
 plaintiff by the judgment of the commissioners’ court
 of Marshall county, rendered at the August term, 1842,
 whereby a claim in favor of plaintiff, and against defend-
 ant, for said sum of three hundred and fifty-eight dollars,
 was allowed, and ordered to be paid; which said judg-
 ment, with interest thereon, is due and unpaid.”

The defendant demurred to the complaint, “because it does not allege that the claim sued on was presented, within the time limited by section 775 of the Code, to the court of county commissioners of Marshall county, and either disallowed by that court, or reduced by it and refused by the plaintiff;” but the court overruled the demurrer. “On the trial,” as the bill of exceptions states, “the plaintiff read in evidence the act of the legislature of this State, approved January 7th, 1841, entitled ‘An act for the final settlement of the controversy between the counties of Marshall and Jackson, touching a certain claim of the former against the latter county;’ (Session Acts 1840–1, p. 101;) and then proved, that at a regular term of the court of commissioners of roads and revenue for the county of Marshall, held in August, 1842, the following judgment or order was made by said court:

‘The State of Alabama, Marshall County, }
 Commissioners’ Court, August term, 1842. }

Marshall County to Jackson County, ... Dr.
 To balance due from said county of Jackson, as by
 an act of the legislature passed on the 7th Janu-
 ary, 1841.....\$358

‘It is ordered by the court, that the same be allowed and paid out of any moneys in the county treasury not other-
 wise appropriated.’

“It was further proved, that on the 16th August, 1842, a certified copy of said order or judgment was issued and delivered to the plaintiff, and was by him on that day filed, as a claim against the defendant, with the county treasurer of said defendant, who thereupon endorsed on it the following words: ‘Jackson county claim vs. Marshall county, No. 441, for \$358, filed 16th August, 1842;’ to which said treasurer signed his name. This being all the evidence, the court charged the jury, that if they believed the said evidence, the plaintiff was entitled to recover a judgment for the debt in said paper mentioned, with interest thereon; to which charge the defendant excepted.”

The overruling of the demurrer to the complaint, and the charge of the court, are assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

WALKER & BRICKELL, *contra*.

A. J. WALKER, C. J.—Counties are by the Code made bodies corporate, with capacity to sue and be sued; but upon the liability to be sued there is this restriction, that no suit shall be brought against a county until the claim or demand has been presented, within a prescribed time, to the court of county commissioners, and has been by such court either disallowed, or reduced and refused by the party.—Code, §§ 763, 775, 2141. The statute, in language which seems incapable of being made plainer by argument or illustration, requires, as a condition precedent to the maintenance of a suit against a county, that the claim or demand shall have either been disallowed, or reduced and refused by the party. This regulation is indispensable, in order that full effect may be given to another section of the Code, which requires, that claims allowed by the court of county commissioners shall be paid in the order of their presentation.—Code, § 791. If, after the allowance of a claim, there should be a refusal to pay, the party injured by such refusal has a remedy, whether it results from the failure to levy the proper tax, or from the tortious conduct of the treasurer.—Tarver v. Comm’rs’ Court, 17 Ala. 526; Code, § 795. After a claim

has been allowed by the court of county commissioners, there is no necessity for a suit against the county, and there is a manifest propriety in prohibiting suit upon it. As the restriction upon the liability of a county to be sued, so plainly declared by the statute, is consistent with the other laws relating to the same subject, and manifestly reasonable and proper, there is not the slightest occasion for departing from the literal mandate of the law. We decide, therefore, that this suit cannot be maintained upon the pleadings and facts before us.

Judgment reversed, and cause remanded.

IN RE CARMICHAEL.

[INQUISITION OF LUNACY.]

1. *To what witness may testify.*—A witness can not be asked, on the trial of an inquisition of lunacy, “whether, in his opinion, the defendant was capable of taking care of himself and managing his affairs.

APPEAL from the Probate Court of Talladega.

IN the matter of John Carmichael, on the petition of Daniel Carmichael, his brother, to have him declared *non compos mentis*. “On the trial before the jury,” as the bill of exceptions states, “the petitioner introduced a witness who testified, that he had known the defendant for fourteen or fifteen years, and had known him well for five or six years last past; that he had not seen him for five or six years prior to 1852, the defendant having been absent from the State; that he had lived within a mile of the defendant, from 1852 until about two years ago, when he (witness) removed about fourteen miles from him; that he was never in the defendant’s house, nor had the de-

fendant ever lived with him, or stayed all night with him; that he only knew the defendant as he knew other neighbors, but was not intimately acquainted with him, and had never transacted any business with him; and that he had observed the appearance of the defendant, and the expression of his face and eyes. On this state of proof as to the witness' knowledge and acquaintance with the defendant," the court permitted the petitioner to ask said witness, against the defendant's objections, the following questions: "Whether or not he was well enough acquainted with the defendant to have an opinion as to his soundness or unsoundness of mind;" "what his opinion was, as to the soundness or unsoundness of the defendant's mind;" and "whether, in his opinion, the defendant was capable of taking care of himself and managing his affairs." The answer of the witness to the last question was, "In my opinion, he is incompetent to take care of himself and manage his affairs." The allowance of these questions, to each of which, with the answers thereto, the defendant reserved an exception, is now assigned as error.

JAS. B. MARTIN, with GEO. S. WALDEN, for appellant.

L. E. PARSONS, and JNO. WHITE, *contra*.

STONE, J.—The witness should not have been allowed to testify that, in his opinion, John E. Carmichael was incompetent to manage his affairs and take care of himself. *Walker v. Walker*, 34 Ala. 469; *Hall v. Goodson*, 32 Ala. 277; *Stubbs v. Houston*, 33 Ala. 555.

Reversed and remanded.

JONES vs. LAWRENCE.

[ACTION ON ATTACHMENT BOND.]

1. *When action lies on attachment bond, for wrongful suing out of attachment.*—The fact that a non-resident debtor, against whom an attachment is here sued out by a non-resident creditor, did not have sufficient property in the State of his residence to pay all the debts then and there owing by him, although sufficient to pay the debt of such attaching creditor, (Code. § 2509.) is no defense to an action on the attachment bond, to recover damages for the wrongful suing out of the writ.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by Francis M. Lawrence, against Seaborn Jones and others; and was founded on an attachment bond, dated the 16th March, 1854, the condition of which was as follows: "The condition of the above obligation is such, that whereas the said Seaborn Jones has, on the day of the date hereof, prayed an attachment at the suit of himself, by his agent, John A. Jones, against the estate of the said Lawrence, for the sum of \$4,327 64, and has obtained the same, returnable to the next term of the circuit court of Montgomery county,—now, if said plaintiff shall prosecute said attachment to effect, and pay the defendant all such costs and damages as he may sustain by reason of the wrongful or vexatious suing out of such attachment, then this obligation to be void, &c. The complaint alleged, that the condition of said bond "has been broken by the defendants, in this—that the said Seaborn Jones has failed to pay plaintiff all such costs and damages as he has sustained by reason of the wrongful and vexatious suing out of said attachment; and plaintiff avers, that said attachment was wrongfully and vexatiously sued out, to his damages as above stated; and that there was, at the time of the suing out of the same, or before or since, no legal cause or ground for

suing out said attachment; and that the said Seaborn Jones and himself, at the time of the suing out of said attachment, were both non-residents of the State of Alabama; and that he (the plaintiff) had sufficient property in Georgia, (which then was, and now is, the State of his residence,) wherefrom to satisfy the debt for which said attachment was sued out against him; and that the said defendants knew that he had sufficient property in said State of Georgia, wherefrom to satisfy said debt; and plaintiff denies that he had not sufficient property in the State of his residence, wherefrom to satisfy said debt for which said attachment was sued out."

"On the trial," as the bill of exceptions states, "the plaintiff introduced evidence tending to show his right to recover damages; and the defendants introduced evidence tending to show, that the plaintiff's property in Georgia, the State of his residence, at the time the attachment against him was sued out, although sufficient to pay the particular debt on which said attachment was sued out, was not sufficient to pay all the debts then owing by him in that State. On this evidence, the defendants asked the court to instruct the jury, that if the plaintiff's property in the State of his residence was not, at the time said attachment was sued out, sufficient to pay all the debts then and there due and owing by him, although sufficient to pay the particular debt on which the attachment issued, then the plaintiff could not recover; which charge the court refused, and the defendants excepted."

The refusal of the charge asked is assigned as error.

WATTS, JUDGE & JACKSON, for appellants.

GOLDTHWAITE, RICE & SEMPLÉ, *contra*.

R. W. WALKER, J.—This is a suit upon an attachment bond, given in a case in which a non-resident creditor sued out an attachment against a non-resident debtor. The Code requires that, in such a case, the plaintiff must, "in addition to the oath necessary in other cases, swear that, according to the best of his knowledge, information and belief, the defendant has not sufficient property within

the State of his residence, wherefrom to satisfy the debt." Code, § 2509. The simple question presented for decision is, whether, when the plaintiff in the attachment is sued on his bond, for wrongfully suing out the attachment, he makes a full defense to the action, by proving that, although the debtor had sufficient property in the State of his residence to satisfy the particular debt on which the attachment issued; yet he did not have property in such State sufficient to pay all the debts then owing by him, and due therein. This question must be answered in the negative. The plaintiff is to swear that, according to the best of his knowledge, &c., the defendant has not sufficient property within the State of his residence "to satisfy the debt." What debt? Obviously the debt to recover which the attachment is sued out. The legislature has required the non-resident creditor, when he proceeds against another non-resident, to swear to a state of facts which, if true, would clearly show that the creditor could not, if he made the attempt, collect his debt in the State of the debtor's residence. The uselessness of legal proceedings there, justifies the resort to the process of attachment here. But it does not follow, that the creditor would be unable to collect his debt in the State of the debtor's residence, simply because the property of the debtor was insufficient to satisfy all of his liabilities. It is not unusual for diligent creditors to collect the whole of their demands against persons whose assets do not equal their debts.

A resident creditor can not sue out an attachment against a resident debtor, simply because the latter is insolvent; and no good reason can be assigned, why one non-resident should be allowed to attach the property of another, on grounds which would not justify such a proceeding on the part of one resident of the State against another. If any difference should be made, it should be rather in favor of the resident, than of the non-resident creditor. The remedy by attachment is a harsh one, at best; and this is especially the case, where both parties are non-residents. We feel no disposition to extend the right to the use of this process by one non-resident against

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another, to cases not falling within the language employed by the legislature.

Whether the existence of reasonable ground to believe that the debtor had not sufficient property in the State of his residence to satisfy the debt of the attaching creditor, would be a defense to an action on the bond, is a question not presented by this record.—See *Pettit v. Mercer*, 8 B. Monroe, 51-2.

Judgment affirmed.

CLARK & SAUNDERS vs. MOBILE SCHOOL COMMISSIONERS.

[GARNISHMENT ON JUDGMENT.]

1. *What constitutes public corporation.*—The Mobile school commissioners, as established by the act “to regulate the system of public schools in the county of Mobile,” (Session Acts 1853-4, p. 190,) constitute a municipal or public corporation.
2. *Against whom garnishment lies.*—A public or municipal corporation is not amenable to the process of garnishment, under the laws of this State; and this exemption involves no violation of the first article of the constitution, which declares that “no set of men are entitled to exclusive, separate emoluments or privileges, but in consideration of public services.”

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THE appellees in this case were summoned by process of garnishment, on the 6th March, 1860, as the debtors of Charles Marechal, against whom the appellants had obtained a judgment, in the circuit court of said county, on the 21st April, 1859. The garnishees appeared, and answered, by way of plea, that they were a public corporation under the act of 1854, entitled “An act to regulate

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the system of public schools of the county of Mobile," (Session Acts 1853-4, p. 190;) and therefore prayed that the garnishment might be quashed. The circuit court overruled a demurrer to the plea, and quashed the garnishment; and its judgment is here assigned as error.

F. S. BLOUNT, for appellants.

P. HAMILTON, *contra*.

A. J. WALKER, C. J.—The Mobile school commissioners certainly constitute a municipal or public corporation. In the Mayor and Aldermen of Mobile v. Rowland, (26 Ala. 498,) it was decided, that such corporations are not amenable to the process of garnishment; and the legislature, by a special enactment, bringing private corporations within the operation of the garnishment law, has very clearly manifested a positive design to leave municipal corporations free from the influence of such law. Pamphlet Acts of 1855-56, p. 6. We think, therefore, it is certain that municipal corporations are not subject to garnishment in this State, and we are content to abide by the decision above cited.

It is contended, that this failure to include municipal corporations among the legal persons liable to be garnisheed, involves the bestowment of a peculiar privilege, in violation of the first section of the bill of rights. We do not yield our assent to this argument. It can make no difference to a corporation, whether it pays a debt which it owes to its creditor, or to one to whom he is indebted. It is, therefore, no benefit, or peculiar privilege, to be exempt from the process of garnishment, returnable to a court of law, whereby the payment will be directed to be made to the person to whom its creditor is indebted, instead of the creditor himself.

Judgment affirmed.

PAYNE *vs.* TURNER.

[BILL IN EQUITY TO SET ASIDE PURCHASE BY ADMINISTRATOR AT HIS OWN SALE.]

1. *Jurisdiction of equity to set aside purchase by administrator at his own sale.*—The chancery court has jurisdiction, at the suit of the distributees of an intestate's estate, to set aside a sale by the administrator of personal property, under an order of the probate court, at which the administrator himself became the purchaser.
2. *When equity will set aside such sale and purchase.*—The purchase of a slave by the administrator in this case, at a sale made by himself under an order of the probate court, was set aside at the instance of the distributees of the estate, on proof that very few persons were present at the sale; that only one bid was made; that the price at which the slave was knocked off was less, by from \$200 to \$400, than her real value; that the administrator made no effort to attract a crowd at the sale, and declined to impart information as to the time and place of sale to the intestate's father, who, as he knew, desired to purchase.
3. *Offer of indemnity.*—In a bill filed by the distributees of an intestate's estate, seeking to set aside a purchase of slaves by the administrator, at a sale made by himself under an order of the probate court, an offer of indemnity is not necessary.

THE bill in this case was filed by John B. Turner and others, as distributees of the estate of Cynthia Payne, deceased, (formerly Cynthia Turner,) against Isaac W. Payne, who was the husband and administrator of said Cynthia; and sought to set aside the sale of a slave by the defendant, as such administrator, under an order of the probate court, at which he himself became the purchaser. The defendant and said Cynthia Turner were married in 1856, and the latter died during the next year, intestate, and without children. Letters of administration on the estate of his said wife having been granted to the defendant, he procured an order from the probate court, on the 11th October, 1858, for the sale of a negro woman belonging to the estate, who was appraised at \$1,000. The sale was made in November, 1858, and the

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defendant became the purchaser, at the price of \$800. The bill charged, that the sale was not advertised as required by law; that very few persons were present at the time of sale; that the administrator concealed from the intestate's father, who, as he knew, desired to purchase the slave, the time and place of sale; that specie was required at the sale, although such demand was not customary; and that the slave was worth from \$1200 to \$1500. The defendant answered the bill; denying all the charges of fraud and unfairness; insisting that all the requirements of the law were complied with, and that the sale was fairly conducted; and demurring to the bill for want of equity—"1st, because complainants have a complete remedy at law; 2d, because complainants do not offer to pay into court the amount for which said slave was sold, or otherwise to indemnify said estate against loss from the death of said slave before she could be resold, or by her not bringing so much at a second sale as at the first; and, 3d, because complainants do not offer to pay respondent such expenses, trouble and risk, as he has incurred with said slave since the sale." The chancellor overruled the demurrer, and, on final hearing on pleadings and proof, rendered a decree for complainants; and his decree is now assigned as error, together with the overruling of the demurrer to the bill.

B. T. POPE, with JAS. B. MARTIN, for appellants.—1. The bill is without equity, because complainants had an adequate remedy at law, by application to the probate court to set aside the sale.—*Crayton v. Johnson*, 27 Ala. 503; *Perrine v. Carlisle*, 19 Ala. 686; *Love v. Crook*, 27 Ala. 624; *Machem v. Machem*, 28 Ala. 374; *Vaughan v. Holmes*, 22 Ala. 593.

2. As to the necessity of an offer of indemnity, see *Gunn v. Brantley*, 21 Ala. 633; *Martin's Heirs v. Tenison*, 26 Ala. 738; and authorities cited in *Shepherd's Digest*, 296, § 6.

3. On the pleadings and proof, the case is with the appellant. His right to purchase at his own sale is undis-

puted; and a critical examination of the evidence will show, that the sale was conducted fairly, and in the usual manner. Under the repeated decisions of this court, the purchase is valid.—*McLane v. Spence*, 6 Ala. 897; *Saltmarsh v. Beene*, 4 Porter, 283.

WM. S. EARNEST, *contra*, cited *McCartney v. Calhoun*, 17 Ala. 301; *Montgomery v. Givhan*, 24 Ala. 568; and *Andrews v. Hobson*, 23 Ala. 219.

STONE, J.—In the case of *McLane v. Spence*, (6 Ala. 894,) speaking of a sale at which the executor became the purchaser of slaves sold by himself, this court said: “We think it clear that this sale could not be supported, if contested by legatees or creditors; but, upon a proper proceeding, would have been set aside, and a re-sale ordered. * * * But, however irregular and voidable such a sale may be, it is not a nullity. The title would pass to the purchaser, until divested by a proceeding against the executor, having that for its object.” This is an authority for the proposition, that though a sale and purchase by the personal representative of an estate may be voidable on a direct proceeding, when there has not been fairness in the sale; still the sale cannot be pronounced void, when it comes incidentally before the court. We have no statute, which either authorizes or requires a confirmation by the probate court of a sale of personal property made under its order. Hence, the *direct proceeding* necessary to set aside such sales, must be one instituted for that specific purpose. We do not doubt the power and jurisdiction of the chancery court, to entertain an application having this for its object.

[2.] The question of purchases by executors and administrators at their own sales has been frequently before this court; and while we have steadily refused to disturb the principles settled in the early cases of *Brannon v. Oliver*, (2 Stew. 47,) and *Beene v. Saltmarsh*, (4 Por. 283,) it has nevertheless been, and still continues to be, a source of regret, that so salutary a rule as that which forbids the union in one person of the antagonistic relations of seller

and buyer, should ever have been broken in upon. It is, however, with us, a rule equally inflexible, that we will not enlarge the exception, which was inaugurated in the case of Brannon v. Oliver.—See McLane v. Spence, *supra*; Cunningham v. Rogers, 14 Ala. 147; McCartney v. Calhoun, 17 Ala. 301; Andrews v. Hobson, 23 Ala. 219; Montgomery v. Givhan, 24 Ala. 568, 584.

In McLane v. Spence, *supra*, it was said, "To support a purchase by an executor or administrator at his own sale, there must be no unfairness; the property must be exposed to sale in the usual and ordinary mode, and under such circumstances as to command the best price." In McCartney v. Calhoun, *supra*, the language of the court was, that, "in order to give validity to such a purchase, it must appear that the sale was fair and *bona fide*." Looking into the testimony in this cause, we think the following facts are established: 1st, that the slave was sold for a sum less than her value, by from two to four hundred dollars; 2d, that very few persons were present at the sale—no competition in bids offered—and no effort made by the administrator to attract a crowd, so as to secure a sale at the best price; 3d, that Mr. Payne knew that the elder Mr. Turner wished to purchase the slave, and, to use a mild expression, he betrayed a hesitancy, if not a reluctance, in having him informed when the sale would take place; and this, too, when the sale had been advertised, and Mr. Payne knew the time when the sale would come off. The sale was not made under *such circumstances as to secure the best price*; and it is difficult to resist the conclusion that there was unfairness in the sale.

[3.] It was not necessary in this case to make to Mr. Payne any offer of indemnity. If the purchase-money had been paid by him, it had been paid to himself. If he has paid out money, he has paid it in his own wrong, and, on another sale, will have the means of indemnifying himself.

The decree of the chancellor is affirmed.

LIDE vs. HADLEY.

[BILL IN EQUITY TO ESTABLISH AND QUIET TITLE TO RIGHT OF WAY.]

1. *Right of way appurtenant, and its incidents.*—A right of way, created by express grant in a devise, is appurtenant to the land devised, and passes by a conveyance of the land to a purchaser from the devisee, without express mention of the appurtenances; it is also a charge upon the servient lands, which attaches to them in the hands of a purchaser from the person to whom they were devised; and it is not terminated, or impaired, by the fact that the owner afterwards acquires from a third person mere permission, revocable at any time, to pass over other lands so as to reach his own.
2. *Jurisdiction of equity to establish and quiet title to right of way.*—A court of equity has jurisdiction, at the suit of a purchaser from the devisee, to enforce the specific performance, against a purchaser of the servient lands, of an express grant by devise of a right of way appurtenant, by establishing the right, defining the track, and enjoining the disturbance of the way.
3. *Compensation.*—On decreeing the specific performance of the grant of a right of way, establishing the right, defining the track, and enjoining the disturbance of the way, the court will also order an account of the damages sustained by the complainant from the defendant's denial and disturbance of his right.

APPEAL from the Chancery Court of Sumter.

Heard before the HON. WADE KEYES.

THE bill in this case was filed by John L. Hadley, against Hugh S. Lide, for the purpose of establishing the complainant's right of way over and across certain lands owned by the defendant, having the track of the way laid off under the order and direction of the court, quieting the title thereto, and enjoining the defendant from disturbing or interfering with it; and it also contained a prayer for an account of the damages sustained by complainant from the defendant's unlawful disturbance of his right of way, and for general relief. The lands belonging to the complainant, and to which he claimed a right of way, were devised by William Godfrey, in 1854, to his

daughter, Mrs. Olivia Underwood ; and were sold and conveyed to the complainant, by Mrs. Underwood and her husband, for valuable consideration, in April, 1855. The defendant's lands, over which the complainant claimed a right of way, and which lay between the public road and the complainant's lands, were devised by said Godfrey to some of his other children ; were sold, under an order of the probate court, in 1856, and purchased by one Brown, who, in March, 1856, sold and conveyed them to the defendant. The complainant asserted a right of way over these lands, to his own, under a clause in the will of said Godfrey, which was in the following words : "It is my will, that my sons William and James, and my daughter Olivia, have a wagou road allotted to them, from my present residence to their land, free of charge ; and, in the event that they and my other heirs cannot agree where said road shall run, they shall select three disinterested persons to lay off said roads." The bill alleged, that Mrs. Underwood and her husband, after the death of the testator, took possession of the lands devised to her, and used a road across the other lands complying with the general directions of the will, without objection from the other heirs and devisees ; that the complainant, after his purchase from Mr. and Mrs. Underwood, continued to use the same road, until some time after the defendant's purchase at the sale under the order of the probate court, when the latter denied his right to the use of said road ; that he then referred the defendant to the will of said Godfrey, and requested him to lay out a road as therein directed ; that the defendant refused to do this, shut up the road which complainant had been using, and refused him all right of way across said intermediate lands, except in one particular direction, which made the road longer, more inconvenient, and outside of the lands which had belonged to said Godfrey ; and that complainant had since been using a temporary way across the lands of Reuben Chapman, by permission of his agent. The defendant answered the bill ; admitting its allegations as to the devises and conveyances of the lands owned by the respective parties ; but denying that the complainant had

a right of way as claimed across the respondent's lands, and that either he or his vendors had used the road as alleged in the bill. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant, and ordered the master to state an account of the damage which he had sustained from the disturbance of his right of way, and to appoint commissioners to lay out the road. The chancellor's decree is now assigned as error.

T. REAVIS, for appellant.—1. Mrs. Underwood had no right of way of necessity under the devise to her, because the will directed how the road should be laid out, and thereby excluded the implication of a way of necessity. *Pierce v. Selleck*, 18 Conn. 321; *Symmes v. Drew*, 21 Pick. 278; *McDonald v. Lindall*, 3 Rawle, 492. Consequently, under the deed from Mrs. Underwood to the complainant, no right of way of necessity passed as appurtenant to the land. But, if a right of way of necessity did pass to the complainant, without regard to the way provided by the will, it was his duty to call on the defendant to designate a way for him; and if the latter refused to do so, he had the right to select one for himself; and if he was in the use of the road as alleged, and the defendant stopped up that road, he had the right to cross any other part of the defendant's lands to reach his own. 19 Wendell, 507; 2 Pick. 574; 8 Pick. 339; 3 McCord, 170. The complainant had, therefore, an adequate remedy at law; and, as a judgment in his favor for a disturbance of his way would have been conclusive on the defendant as to his right to that particular way, there was no necessity to go into equity.—11 Harris, 333.

2. No road having been laid out, in the manner directed by the will, at the time of the conveyance by Underwood and wife to the complainant, the way was not then *in esse*. The granting part of the deed does not convey the right to the way devised by the will. If that right be conveyed at all, it must be by the clause of warranty, which could only operate by way of bargain and sale, or covenant to stand seized, and could not pass the right to

a way not *in esse*.—Beaudely v. Brook, Cro. Jac. 189; 2 Hilliard on Real Property, 324; Saltmarsh v. Smith, 32 Ala. 404.

3. Mrs. Underwood had no right of way, except that given by the will, which was to be laid off by agreement between her and the heirs of Godfrey, or by persons selected by them. Her right to agree, or, in case of disagreement, to select commissioners, was personal to herself, and a privilege which the heirs were interested in having her exercise personally, and which she could not convey to another without the consent of the heirs. But, if she could and did substitute the complainant to all her rights under the will, he certainly acquired no greater rights than she had; and therefore, if he can come into equity at all, he can only do so by alleging the impossibility of agreeing on a way, and of obtaining three disinterested persons to lay it off, as provided by the will.—Watkins v. Tuskalooza Man. Co., 32 Ala. 518.

4. If a party can come into equity to enjoin the disturbance of a right of way, (for which no precedent has been found,) he must first have established his right at law, or must show by his bill a clear title to a particular way. Burden v. Stein, 27 Ala. 104.

5. If any of the above positions be correct, the bill is without equity. If, however, it be held to contain equity, the proof does not sustain it. The answer denies the allegations of the bill, as to the use of the road by either Mrs. Underwood or the complainant, and there is no proof to sustain these allegations; on the contrary, the complainant's only witness on this point proves his use of an entirely different road.

6. The complainant was not entitled to an account of damages.—2 Story's Equity, §§ 794, 794 a.

T. B. WETMORE, *contra*.—1. The complainant's bill shows a right of way of necessity, as well as by express grant under the will of Godfrey.—2 Hilliard on Real Property, §§ 49, 62; 1 Barbour's Ch. 354; 15 Conn. 39; 19 Wendell, 507; 24 Barbour, 44; 20 English Law and Eq. 561. This right was appurtenant to the land, and

passed to the complainant, under his deed from Mrs. Underwood, without express grant; and it was a charge on the servient lands after the defendant had acquired them. 10 B. Monroe, 463; 11 Harris, 333; 7 Foster, (N. H.) 453; 2 Hilliard R. P. §§ 60, 85, 87; and authorities above cited. This right could only terminate by the complainant's acquisition of other lands, over which he might pass, and was not affected by his permission to pass over the lands of Chapman.

2. The complainant had a clear right to come into equity, to enforce the specific performance of the grant, to have the way established and laid out, his title thereto quieted, and the defendant restrained from further disturbance of it.—1 Spence's Equity, 646; Story's Equity, §§ 783-4, 788; 6 Serg. & R. 75; 10 B. Monroe, 463; 10 Maryland, 89; Woolwych on Ways, 52.

3. The right to compensation, or an account of damages, is an incident to the other relief.—30 Ala. 307.

R. W. WALKER, J.—The will of William Godfrey contained an express grant to Mrs. Underwood of a right of way from the public road to the land devised to her, over the intermediate land of the testator. This right was appurtenant to the land devised, and not a right in gross; and passed by a conveyance of the land to the alienee, without express mention of the appurtenances.—Coke's Litt. 121 (b.); Smiles v. Hastings, 24 Barb. 44, 48; Underwood v. Carney, 1 Cushing, 285, 290; Trustees v. Cowen, 4 Paige, 510, 514; Pitkin v. L. I. R. R. Co., 2 Barb. Ch. R. 231; Williams on Real Prop. 269; 2 Hilliard on Real Property, (3d ed.) p. 16, §§ 60, 62-3, &c. In like manner, it was a charge upon the intermediate land; and when the defendant purchased that land, he took it subject to the easement.—Wissler v. Hersey, 23 Penn. St. R. 333; Hills v. Miller, 3 Paige, 254; Wolfe v. Frost, 4 Sandf. Ch. 72.

A right of way of *necessity* ceases with the necessity which gave rise to it; so that, if a public road is opened, or the grantee purchases other land, which gives him a way over his own land, the first right of way ceases.

Collins v. Prentice, 15 Conn. 39; Pierce v. Selleck, 18 Conn. 321; N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. R. 353; Holmes v. Goring, 2 Bing. 76. But the case is otherwise, where the owner of land has a right of way to the same, over the premises of another, by prescription, or by *express grant*.—N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. 362. Even if it be conceded, that the right which the complainant obtained by his purchase from Mrs. Underwood, would terminate whenever he acquired another way to the land devised; it certainly is not impaired by the fact, that he has a mere permission, revocable at any time, to pass over Chapman's land, so as to reach his own. A privilege which is held by mere favor, and which may be withdrawn at any moment, can in no sense be deemed a right; and we apprehend that it is the acquisition of a legal right to another way, which terminates a prior way of necessity.

[2.] The difficulty in the case is not as to the existence of the complainant's right, but as to whether there is any ground of equitable jurisdiction. The testator, in granting the right, prescribed the general direction of the way, but did not designate its specific track. He left this to be done by agreement between the devisee of the right and his other heirs, and provided that, in the event they could not agree upon the location of the way, they should select three disinterested persons to lay off the road. The devisee and the heirs parted with the dominant and servient estates, without having located the way, or selected commissioners for that purpose; and the right and duty of making the location, or, in case of disagreement, of selecting third persons to do so, have devolved upon their respective alienees. At all events, the devisee of the right, and the heirs who were the owners of the land subject to it, have, by conveying to others their interest in the property, divested themselves of all authority in reference to the location of the way. The right to have a way allotted to him certainly passed to the complainant; and if he obtained the right, unattended by the privilege which the will conferred on Mrs. Underwood, to participate in the specific location of the road, or to have a voice in the se-

lection of commissioners for that purpose, this, of itself, would seem to justify the interposition of chancery; otherwise, there would be a clear right to have a way, but no means of designating and laying off its specific track.

Nor is the result different, if we assume, as we think may properly be done, that the complainant and the defendant have, by their purchases, been substituted to all the rights which the will conferred on the heirs and devisee, in reference to the location of the road. True, it is not shown that the complainant called upon Lide to join him in designating the track of the way, or in selecting commissioners for that purpose. But it is alleged and proved, that the defendant denied entirely the existence of any right in the complainant to have a way over the lands in question; and it is shown by the defendant's answer, as well as by his previous acts, that a demand for the location of the road, either by the parties themselves, or by third persons to be chosen by them, would have been useless. It was not necessary, therefore, to allege or prove such demand; and the rights of the parties, in a court of chancery, are just what they would have been if the making and refusal of such demand had been alleged and proved.—*Elliott v. Boaz*, 9 Ala. 779. This being so, the case presented is briefly this: The complainant has, by express grant, a right to have a way over the lands of the defendant. By the terms of the grant, the specific location of the way is to be determined by the joint action of both parties, either by laying off the road themselves, or by selecting three disinterested third persons to do so. The defendant, however, denies the right of the complainant, and repudiates all obligation on his part to act in the premises. By his refusal to perform the duty cast upon him by his purchase of the servient estate, the means which, by the terms of the grant, were provided for the location of the way, have failed. The right of the complainant, however, is not thereby destroyed. That is still perfect, although the defendant's refusal to perform his duty may have deprived the complainant of the means of specifically defining the way to which he is entitled. Under these circumstances, it seems clear that the complain-

ant may come into a court of equity, to enforce specific performance of the grant.—See 2 Story's Eq. § 788.

It may be said, that on the refusal of Lide to join in locating the way, or in selecting commissioners, the complainant was himself authorized to lay off the road, corresponding with the general directions of the will; and that, having the power to establish the track of the road by his own act, he cannot call upon a court of equity to establish it for him, or to afford him any relief in relation to it, unless he has first, by the exercise of his privilege of location, obtained a right to a particular way. Without stopping to consider whether the complainant had any such right to locate the way as is here supposed; or, if he had, whether he was bound to assert it by an actual location, as a condition essential to his claim to equitable relief, a satisfactory reply to this position is found in the fact, that if the complainant had such right, it is sufficiently shown that he exercised it. After Hadley bought, he at first used a way, not corresponding with the old road used by Godfrey in his life-time. On the suggestion of the defendant; the road traveled by the complainant was changed, in 1855 or 1856, so as to correspond with the old road used by Godfrey. The road as thus changed is that which is laid down in the map which forms an exhibit to the original bill. This road the complainant continued to use, until it was obstructed by the defendant; and although his right to use it was always denied by the defendant, it is plain that the complainant asserted his claim to use it as secured by Godfrey's will. If, then, the complainant was authorized to locate the way, he did, in effect, do so, by adopting and claiming the right to use the particular road last spoken of. The allegation that Mrs. Underwood used this particular road before her sale to the complainant, is not proved; nor was it necessary that it should be, as the complainant's title to relief is made out without establishing that fact. This is not a case of variance, but a failure to prove an unnecessary allegation. On the supposition, then, that the complainant had the right to locate the way, and has exercised it, the bill might

be maintained, as a bill to quiet his title to the use of that particular way, and to enjoin the disturbance of it.

A court of law might, it is true, give damages for a disturbance of the way. But that would not afford adequate relief for such an injury. Hence, it is settled that, where easements or servitudes are annexed, by grant or otherwise, to private estates, the due enjoyment of them will be protected against encroachments by injunction, although an action for damages would lie at law.—*Hills v. Miller*, 3 Paige, 254; *Trustees v. Cowen*, 4 Paige, 510, 514; *Seymour v. McDonald*, 4 Sandf. Ch. 502; 2 Story's Eq. §§ 925–6–7; *Burden v. Stein*, 27 Ala. 104. A recovery at law might be, in some measure, indemnity for the past, but would hardly be security for the future. The way might, and probably would, be again obstructed, and the farm rendered comparatively valueless by the inability of the owner to cultivate it. To deny to the owner of land, suited for agricultural purposes, all access to it, is to take so much from the general wealth of the community; and is, therefore, an indirect injury to the public, as well as a direct wrong to the individual proprietor. In *Dalton v. Taylor*, (2 Lutw. R. 1487,) one of the grounds on which the existence of a way of necessity is placed, is, that it is not for the public good that the close should be left uncultivated. The fact that the remedy at law is embarrassed, or doubtful, or difficult, or less full and complete than the remedy in equity, is enough to justify resort to a court of chancery.—*Am. Ins. Co. v. Fisk*, 1 Paige, 90; *Boyce v. Grundy*, 3 Peters, 210; *Barnes v. Lloyd*, 1 How. Miss. 584; *Pearl v. Nashville*, 10 Yerger, 179.

In any aspect of it, the case is one for equitable cognizance. But we are best satisfied to rest the jurisdiction of the court on its power to enforce specific performance of the grant, by establishing the right, and defining the track of the way, and its authority to enjoin the disturbance of the way when thus laid off.

[3.] The account of the damages which the complainant had sustained, was properly decreed, as an incident to the other relief granted.—30 Ala. 307. And it makes no difference as to this claim, whether the specific way to

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which the complainant was entitled had or had not been designated. He had the right to have *some* way over the land of the defendant. Of this right he was deprived by the latter; and if the deprivation of his right has wrought an injury to the complainant, he is entitled to compensation.

Decree affirmed.

MIMS vs. STURDEVANT AND WIFE.

[PROCEEDING IN PROBATE COURT TO CHARGE EXECUTOR WITH SLAVE NOT INCLUDED IN INVENTORY.]

1. *Conclusiveness of judicial decisions.*—After a judgment of the probate court has been twice reversed on error, and the cause remanded for further proceedings, the appellate court will not, on a third appeal, consider the question whether the probate court had jurisdiction of the proceeding: that question having been implicitly involved in the former decision, although the point was not then directly made.
2. *Mode of impeaching witness.*—A party, against whom the deposition of a witness has been read in evidence, can not prove, by the subsequent unsworn declarations of the witness, "that he was drunk when his deposition was taken, that he did not know what he had sworn, that he knew nothing about the facts to which he had testified, and that the commissioners wrote down what they pleased."
3. *Admissibility of evidence of absent witness on former trial.*—The permanent absence of a witness from the State authorizes the admission of his testimony as given on a former trial of the cause.
4. *Refreshing memory of witness; admissibility of memorandum.*—A witness who made a written memorandum of facts at the time of their occurrence, and who testifies that he knew the memorandum to be correct when he made it, though he does not now remember the facts, may read the memorandum to the jury as a part of his evidence.
5. *Admissibility of decision of presiding judge on former trial.*—On the trial of an issue before the probate court, the opinion and decision of the presiding judge on a former trial is not admissible evidence.
6. *Relevancy of evidence on question of title to slave.*—On the trial of an issue between an executor and some of the legatees under the will,

the issue being whether the slave in controversy belonged to the executor individually or to the testator, the fact that the testator "was not in the habit of buying property without first seeing it," is relevant and admissible evidence for the executor.

7. *Same.*—In such case, the legatees having proved that the slave was employed on the testator's premises, the executor may prove, in rebuttal, that he permitted his slaves to work on the testator's premises.
8. *Form of judgment.*—In a proceeding before the probate court, by which the legatees seek to charge the executor with the value of a slave not included in his inventory; the jury having returned a verdict against the executor, assessing the value of the slave at a specified sum,—the court can not render a judgment against the executor, for the assessed value of the slave.

APPEAL from the Probate Court of Covington.

IN the matter of the estate of Britton Mims, deceased, on the suggestion of Willis Sturdevant and wife that the executor, Stanford Mims, had not made a full inventory of the property belonging to the estate, but had failed to charge himself with a slave named John, whom the executor claimed as his own property. The proceeding was commenced in the orphans' court of Monroe county, in September, 1846; and a judgment was rendered by that court, without the intervention of a jury, in November, 1852. This judgment was reversed by this court, on writ of error sued out by the executor, at its June term, 1853, and the cause was remanded.—See the case reported in 23 Ala. 664. After the remandment of the cause, it was transferred to the probate court of Butler, and thence to the probate court of Covington, where a trial was had before a jury in November, 1857.

"On the trial before the jury," as the bill of exceptions in the present record states, "the plaintiffs introduced and read to the jury, with other testimony, the deposition of Hillary Mims, who testified, among other things, that he had heard the defendant repeatedly say that he had bought the slave in controversy for his father, Britton Mims, and with his father's money. To contradict the influence of this proof, the defendant offered to prove, that said Hillary Mims had publicly stated, after his said deposition

had been taken, that he was drunk when said deposition was taken; that he did not know what he had sworn; that he knew nothing about the case; that the commissioners wrote down what they pleased; and that he never heard the defendant say that said slave belonged to his father, or that he had bought him with his father's money. The defendant further proved, that he had made every possible effort, so soon as he learned this fact, to have said witness re-examined, and questions propounded to him about these matters; and that said witness left the State before he could do so, and was still absent. To rebut this proposed proof, the plaintiffs read in evidence the depositions of the commissioners by whom the deposition of said Hillary Mims was taken, and who testified, that said Hillary was sober when they took his deposition; that his answers to the interrogatories were taken down by them in his own language, as nearly as possible, and were then read over to him, and that he assented to their correctness. In this connection, the plaintiffs objected to what the defendant had proposed to prove, because no predicate had been laid for the purpose of impeaching said witness; the court sustained the objection, and the defendant excepted."

"The plaintiffs also introduced the deposition of S. J. Cumming, for the purpose of proving, among other things, what one Hardin, a witness for plaintiffs, had sworn on a former trial of this cause." Said Cumming testified, in substance, that on the former trial, before the probate court of Monroe, he was one of the plaintiffs' attorneys, and took notes of the testimony of said Hardin, as given on that trial; that he had no recollection of the testimony of said witness, except as shown by his notes, (which were made an exhibit to his deposition,) but was fully satisfied that said notes contained a true statement of the entire testimony of said Hardin on that trial; and that Hardin had since removed to Texas, but he (Cumming) had not been able to find out his place of residence. The defendant objected to the admission of Cumming's notes as evidence, "because they were incompetent evidence, and because no copy of them was filed with the interrogatories,

or served on the defendant, before said witness was examined"; and also moved to exclude from the jury "all the testimony of said Cumming in relation to what said Hardin had sworn, because (there being no other evidence on the point) it did not show a sufficient ground for the absence of the witness, or the failure to take his deposition; and because the witness had no independent recollection of the facts to which he testified, aside from his notes." The court overruled all these objections, and admitted the evidence; and the defendant excepted.

"The defendant further offered to prove, that Britton Mims, in his life-time, was not in the habit of buying property, without first seeing it. The plaintiffs objected to this evidence; the court sustained the objection, and ruled out the evidence; and the defendant excepted.

"Together with other testimony in the cause, was the deposition of the probate judge of Monroe county, before whom this cause had been once tried, and who had decided it, without a jury, in favor of the plaintiffs. The object in examining said witness was, to prove what one Andrews, who had since died, had sworn before him on the former trial. The plaintiffs propounded to said witness the following interrogatory: 'If this cause was ever tried before you, state how you decided it'; to which the witness answered, 'I decided, that the slave in controversy was the property of Britton Mims at the time of his death, and that the value of said slave at that time was \$900.' To this question and answer, each, the defendant objected, and moved to exclude the same from the jury; the court overruled the objection, and the defendant excepted.

"For the purpose of explaining Britton Mims' possession of the slave, (the proof showing that said slave was sometimes in the possession of Britton Mims, and sometimes in the possession of the defendant,) the defendant offered to prove, that he permitted his negroes to work at his father's house. The court excluded this evidence, on the plaintiffs' objection, and the defendant excepted."

The jury returned a verdict for the plaintiffs, and assessed the value of the slave at \$700; and the court thereupon rendered judgment, "that the plaintiffs recover of

the defendant the said sum of \$700, so assessed by the jury, together with the costs," &c.

The several rulings of the court to which exceptions were reserved, and the judgment rendered on the verdict, are now assigned as error; and the last assignment is, that the whole proceeding is void for want of jurisdiction.

WM. P. CHILTON, with ADAMS & HERBERT, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

A. J. WALKER, C. J.—This was a proceeding instituted by suggestion in the orphans' court, in 1846, by a legatee, for the purpose of obtaining a judicial ascertainment that a certain slave, not included in the inventory, belonged to the testator's estate; and of further obtaining a judgment that the executor should stand chargeable with the same, as a part of the estate. It is urged now in this court, that the orphans' court had no jurisdiction of the proceeding, disconnected as it is from a settlement of the administration upon the estate; and that this court ought now to reverse the decree of the court below, and render a judgment dismissing the entire proceeding. We do not now determine what ought to be the decision of this court upon the question of the jurisdiction of the orphans' court, if it were presented to us unembarrassed by the previous decisions in this case. As bearing upon that question, we refer to the cases of *Dobbs v. Cockerham*, (2 Porter, 328,) and *Merrill v. Jones*, (8 Porter, 557.) This case has been twice before in this court; once at the June term, 1850, and again at the June term, 1853. The decision in the case when it was first in this court, is not reported. The decision made when the case was here the second time, is reported in 23 Ala. Rep. 664. In both instances, the judgment or decree of the court below was reversed, and the cause remanded. The two judgments of this court, reversing and remanding the cause to be further proceeded in, involved the assertion that the court below had jurisdiction of the subject-matter; for the judgment rendered was manifestly improper, if the court below had no jurisdiction. The decision of this court, thus

virtually asserting the jurisdiction of the court below, is the law of this case, and we cannot rule in opposition to it.—*Matthews, Finley & Co. v. Sands*, 29 Ala. 136; *Skillerns v. Mays*, 6 Cr. 267.

[2.] The court below did not err in excluding evidence of the unsworn declarations of the plaintiffs' witness, as to the manner in which his testimony was taken, his condition at the time, and his knowledge of the facts proved by him.

[3.] This court decided in *Long v. Davis*, (18 Ala. 801,) that a permanent absence from the jurisdiction on the part of a witness will authorize the reading of his testimony given in a former trial of the cause. Such, we have no doubt, is the correct rule in civil causes.—1 *Greenleaf on Ev.* § 163, note; 1 *Phil. Ev.* (C. & H.'s notes,) 393, 394; *Finn's case*, 5 *Rand.* 701.

[4.] Notwithstanding there is a contrary tendency in our past decisions, we think it a proposition both reasonable and sustained by authorities, that a witness who has made a written memorandum of facts presently upon their occurrence, and who does not remember the facts, but is able to swear that he knew the memorandum to be correct when he made it, may read the memorandum as a part of his evidence to the jury.—*Holmes v. Gayle & Bower*, 1 Ala. 517; *Vastbinder v. Metcalf*, 3 Ala. 100; *Downer v. Rowell*, 1 *Ver.* 343; 2 *Phillips on Ev.* (C. & H.'s notes,) (4th Am. ed.) 918; 1 *Green. on Ev.* §§ 437, 438; *Burton v. Plummer*, 2 *Ad. & El.* 341. We do not decide, upon the record before us, whether the memorandum made by the witness Cumming, of what Hardin swore upon a former trial, should have been read to the jury. The principles which we have laid down above will be sufficient to guide the court upon a future trial, in determining upon the admissibility of the evidence. If there be any deficiency in the testimony of Cumming, it will probably be supplied on a future trial.

[5.] The opinion given by the probate judge upon a former trial was not, upon any principle known to us, admissible in evidence.

[6.] The habit of Britton Mims, as to not purchasing

property without seeing it, in connection with the peculiar circumstances of this case, may have some bearing upon the question of fact in the case; and we decide, with some hesitation and doubt, that it was competent evidence for the executor, and against one asserting the title of Britton Mims.

[7.] The evidence proposed by the defendant, as to his permitting his slaves to labor on his father's premises, should have been admitted. It contributed to explain the plaintiffs' evidence, that the slave John had been employed on the premises of the defendant's father.

[8.] The court erred in rendering judgment for the value of the slave against the defendant. Such a judgment is foreign to the purposes of the proceeding. If such a judgment could be rendered in this proceeding, the defendant would be deprived of all opportunity to show that the slave was required to pay debts, or for other legitimate purposes incident to the administration. The only judgment which can be rendered in the case is, that the slave belonged to the decedent, and is a part of the assets of the estate, and that the representative stands chargeable with him as such.

Reversed and remanded.

STETSON & CO. vs. MILLER.

[CREDITORS' BILL TO SET ASIDE DEED OF TRUST AS FRAUDULENT.]

1. *Validity of deed of trust for benefit of preferred creditors.*—A deed of trust, made by a debtor in failing circumstances, while actions at law were pending against him, and only a few days before the rendition of judgments; conveying his stock of merchandise, storehouse and residence, which constituted the bulk of his visible property, to a trustee for the benefit of certain *bona-fide* creditors: authorizing the trustee to sell the goods "at either public auction or private sale, as in his judgment may be best calculated to bring

the largest sum of money;" and providing that the proceeds of the sale of the property, after payment in full of the secured debts, together with the costs and charges attending the execution of the trust, should be paid over to the grantor or his order, (which deed was declared by this court, on a former appeal, not to be fraudulent and void on its face,)—held not fraudulent in fact, on proof that the trustee sold the goods at retail, and mostly on credit till the end of the current year; that the grantor afterwards paid some of the secured debts with funds not conveyed by the deed; and that he declared a few days after the execution of the deed, but not in the presence of the beneficiaries, that his object in executing it was "to keep the executions out of his house."

2. *Difference between deed of trust and general assignment.*—A deed of trust, executed by a debtor in failing circumstances, and conveying the bulk of his visible property to a trustee for the benefit of certain preferred creditors, cannot be held a general assignment, (Code, § 1556,) when it appears that the grantor had also notes and accounts due him, of considerable value, not conveyed by the deed.

APPEAL from the Chancery Court at Tuskaloosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellants, as judgment creditors of Thomas Miller, against said Thomas Miller and one James H. Dearing; and sought relief against a deed of trust, executed by said Miller on the 21st September, 1854, by which he conveyed his entire stock of merchandise, his store-house, and residence in the city of Tuskaloosa, to said Dearing as trustee, for the benefit of certain specified creditors, whose debts amounted in the aggregate to nearly \$8,000, and were either past due or fell due within six months after the execution of the deed. The bill, as copied into the transcript in the present case, alleged that said deed "was made with intent to hinder, delay and defraud said complainants, with other creditors of said Miller not therein named, of their lawful debts, and is therefore void; or that said deed is a general assignment, by which a preference of payment is given to the creditors therein named, over the other and remaining creditors of said Thomas Miller." The prayer of the bill was, "for such relief as complainants may be entitled to on the case made by their bill of complaint,

and as may be consistent with the justice and equity of their case." The chancellor held the deed void on its face, as to the complainants; but his decree was reversed by this court, and the cause remanded, at the January term, 1858.—See the case reported in 32 Ala. 161, where the provisions of the deed are set out *in extenso*. (The former report of the case contains a mistake of fact, in stating that, at the time of the execution of the deed, some of the complainants had obtained judgments at law against the grantor: all of the judgments were in fact rendered on the 29th September, 1854, eight days after the execution of the deed.)

The bill further alleged, that said Miller, at the time of the execution of said deed, was in failing circumstances; that the deed conveyed all his visible property that could be reached by execution at law, though he had "many thousand dollars in debts due and owing to him, none of which was conveyed by said deed," and as to which a discovery was sought from him; that said Miller continued in the possession of the stock of goods after the execution of the deed, and disposed of them at private sale, professing to act as agent of the trustee. The defendants filed separate answers. Miller denied all fraudulent intent on his part in the execution of the deed; asserted the *bona fides* of the secured debts, and his intention to provide honestly for their payment; alleged that the deed was not a general assignment—that he had outstanding judgments, notes and accounts due him, (a list of which was appended to his answer,) amounting to over \$18,000, and also several small parcels of land; that he acted in the sale of the goods, after the execution of the deed, solely as the clerk and agent of the trustee; and that the goods were sold at retail, partly for cash, but mostly on credit until the 1st January, 1855. Dearing's answer was substantially the same, as to the matters within his own knowledge; and he adopted the answer of his co-defendant in other particulars.

The complainants took the depositions of J. B. Rogers, J. M. Van Hoose, and N. L. Whitfield. Rogers was the sheriff of Tuskaloosa county, who received and returned

the executions issued on the complainants' judgments; and he testified in relation to them as follows: "Shortly after I received said executions, I applied to Mr. Miller for payment. He said that he had no money, and that it was utterly impossible for him to settle the executions. I then asked him for property to levy on; to which he replied, that he had no property subject to levy—that the stock of goods, the store-house, and the 'Van Dyke house,' were all conveyed by deed of trust to James H. Dearing, which I could see by going to the court-house. I afterwards applied to him a second time, and told him I was going to his dwelling-house to make a levy. He then said, that it was useless for me to go down there, as the house and lot, and everything there, down to the knives and forks, belonged to Dr. Tindall long ago; but he promised to pay the costs, and afterwards did so. Said Miller was a merchant in Tuskaloosa, and had been for years before. He remained at the same business until some time in the summer of 1855, when the goods were sold at auction."

Van Hoose testified as follows: "I had a conversation with said Miller about said deed of trust, some two or three days after the same bears date, which was brought about in this way: As attorney for Bates, Taylor & Co. of New York, and W. A. Hanney, of New Orleans, I had had two claims against him for collection, and called on him to settle them; he asked me to take drafts on Mobile, payable several months after date, and said he expected to give James H. Dearing as endorser. I then wrote to the holders of the claims, to know if they would consent to the extension asked by Mr. Miller. They did consent, and I informed Mr. Miller of the fact; and he thereupon requested me to make a calculation of the amount due, and leave the same with him, and he would get the drafts endorsed according to agreement. I did so. In a few days afterwards, I heard that he had made an assignment, and thereupon called to see him relative to our agreement. I found that he would not then give the drafts as he had promised, and asked what I should now say to the parties; to which he replied, 'Tell them

I will pay them—that their debts are good.’ I then asked him why he had made the assignment. He replied, that Judge Peck and Judge Mudd had sued him, and judgments would soon be rendered; that he had made the assignment to keep the executions out of his house; and that if executions were levied on his goods, it would spoil everything, or words of like effect. I afterwards received another claim on Mr. Miller, and called to see him about it. He told me to write to the parties that he would pay it, and that they had known him long enough to be sure that he would keep his word; and he added, that the debts secured in the deed were ‘a mere dross’—that he did not regard them, could soon pay them out, etc.; that he made the deed ‘to get a breathing time,’ or words to that effect, and that the executions would have been down on him, if he had not made the deed.” The witness further stated, that Miller had no visible property not conveyed by the deed.

Whitfield testified as follows: “I, as attorney, obtained judgments against said Miller, one in favor of M. S. Stetson & Co., and another in favor of Oliver, Jones & Granger. The claims upon which I obtained said judgments, came to my hands, I believe, about the 1st August, 1854. I immediately presented them to Mr. Miller for payment, and told him, that I was instructed to bring suit to the first court, if they were not paid. He said he could not pay them, and urged me not to sue him; stating positively that he would pay the amount before the sitting of the September court. I left him without any definite agreement about the matter; but subsequently, on the 1st September, I think, I called on him again, and told him I must bring suit. He then urged me to let him acknowledge service of the summons, with waiver of docketing the cases before court, and that he would pay the amount the last Saturday before the sitting of the court. I accordingly took his acknowledgment; but he never called to pay the debt, and I never had any further conversation with him on the subject.” The witness further testified to the pecuniary condition of Mr. Miller’s debtors, whose debts were included in the exhibits attached

to the answer; stating that most of them, of whom he had any knowledge, were insolvent, or had left the State.

The defendants took the depositions of several witnesses, who testified to the *bona fides* and payment of the debts secured by the deed; some being paid by the trustee, and others by Miller with money and assets outside of the property conveyed by the deed.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, but without prejudice to the complainants' right to file another, for the purpose of subjecting the surplus which might remain in the hands of the trustee after the satisfaction of the secured debts; and his decree is now assigned as error.

E. W. PECK, for the appellants.

ORMOND & NICOLSON, *contra*.

STONE, J.—When this case was before in this court, (32 Ala. 161,) we said: “We have examined all the objections urged against the validity of the deed exhibited with the bill; and we are fully convinced, and therefore decide, that there is nothing *on its face* which renders it void as to the complainants, or authorizes any court to declare it void as to them.”

This case, as presented on the final trial in the pleadings and proof, presents but few features worthy of remark, which were not presented on the former trial in this court.

First: There was some delay, and there were some postponements in making sale of the merchandise; and the sales were chiefly on credit. Looking into the facts and circumstances attending the sales, we think good and satisfactory reasons are given for most, if not for all of them. But if the record failed to respond to these inquiries, we can readily perceive that, in making sale of such commodities, so as best to promote the interest of the beneficiaries, it might, and probably would, benefit the creditors provided for, as also the general creditors of the assignor, if the assignee were, in certain states of the money-market, to postpone the sale, or sell on reasonable

terms of credit. We find nothing in this record to convince us that, in this case, the assignee was not influenced by an honest and prudent policy in making sale of the merchandise; and hence we hold, that in this objection there is not enough to justify us in pronouncing the deed fraudulent.—*Dubose v. Dubose*, 7 Ala. 235; *Planters & Merchants' Bank v. Clarke*, *ib.* 765; *Tarver v. Roffe*, *ib.* 873; *Abercrombie v. Bradford*, 16 Ala. 560; *Doc, ex dem. v. Pl. & Mer. Bank*, 22 Ala. 238.

Second: It is urged, that some of the debts secured by the deed were afterwards paid by the assignor, with funds not conveyed by the assignment. It seem to us that this repels, rather than strengthens the imputation of fraud. It shows both an intention in the grantor to discharge his debts, and a willingness to employ for that purpose means which still remained in his control. Moreover, as remarked by the chancellor, such payment with outside means would necessarily tend to augment any surplus that might remain in the hands of the trustee, and thus localize and consolidate a tangible fund for the payment of unpreferred debts.

Third: The testimony of the witnesses Whitfield and Van Hoose is ineffectual to overturn this deed, for two reasons: first, much of the conversation of Mr. Miller, shown by that evidence, tends rather to show promises made by him, and afterwards broken, than a purpose to delay, hinder or defraud his creditors; and second, the beneficiaries in the deed were *bona-fide* creditors, and there is no evidence that they participated in, or knew of those conversations. The testimony fails to convince us that Mr. Miller had any other purpose than to give a preference to some of his creditors over others. This he had a right to do.—See this case at the former term.

[2.] Both the bill and the testimony show, that Mr. Miller had much property, and of considerable value, outside of the deed. Hence, this is not shown to have been a general assignment, so as to destroy the preference.

We find no error in the record, and the decree of the chancellor is affirmed.

OVERSTREET vs. NUNN'S EXECUTORS.

[TROVER FOR CONVERSION OF PROMISSORY NOTE.]

1. *When action lies.*—When a note is endorsed and transferred as collateral security, a subsequent payment of the original debt by the transferee operates as a re-transfer to him of the endorsed note; and if the creditor, or his personal representative, refuses to deliver the note on demand, trover lies against him for the conversion.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. PORTER KING.

THIS action was brought by James Overstreet, against L. B. Parker and M. C. Nunn, who were the executors of William Nunn, deceased, to recover damages for the conversion of a promissory note for \$1300, executed by one E. G. Wagner, dated the 25th November, 1857, and payable to the plaintiff, or bearer, on the 1st February, 1859; and was commenced on the 23d April, 1859. The defendants pleaded not guilty, "with leave to give any special matter in evidence." On the trial, as the bill of exceptions shows, after the plaintiff had read in evidence the note on Wagner, which was the foundation of the action, "he further proved, that he was the absolute owner of said note at the time of its execution; that said note was founded on valuable consideration, was justly due according to its terms when executed, and was of the full value of the amount due on its face, with interest thereon; that on the 1st March, 1858, after the execution of said note, he borrowed \$1200 from said William Nunn, for which he executed to said Nunn his promissory note for \$1350, due the 1st March next after date, together with a mortgage on three slaves, and also endorsed and delivered to him the said note on Wagner, as an additional and collateral security for the payment of said borrowed money, and for no other purpose." The

endorsement on said note was in these words: "I endorse the within note, for value received, until paid, this 28th March, 1858;" which was signed by the plaintiff. "The plaintiff also introduced proof, by the declarations of said William Nunn, tending to show that said note on Wagner was to be returned to plaintiff, when he should pay said Nunn the money so borrowed from him, and for which said note was deposited as collateral security as aforesaid. The defendants objected to the introduction of any evidence, as to the terms on which Wagner's said note was transferred to said Nunn, other than those stated and set forth in the said written endorsement on said note; but the court decided to allow all of said evidence to be introduced, and to charge the jury as to the legal effect of the same."

The plaintiff further proved, that said Nunn died on the 16th July, 1858; that the defendants soon afterwards qualified as his executors, and, as such executors, received the possession of said note on Wagner; that on the 11th February, 1859, they collected from Wagner one thousand dollars on said note; that the balance was still due and unpaid; that on the 28th February, 1859, he paid said executors his note to Nunn for borrowed money, and took up and canceled said note and the mortgage given to secure it; that he afterwards demanded of the defendants said note on Wagner, and that they refused to deliver it to him. "This being all the evidence, the court charged the jury, that the plaintiff was not entitled to recover at law, and that they must find for the defendants; to which charge the plaintiff excepted, and was thereby compelled to take a nonsuit."

The charge of the court, and "the matters arising on the bill of exceptions," are now assigned as error.

WATTS, JUDGE & JACKSON, for appellant.

WM. L. YANCEY, with W. H. NORTHINGTON, *contra*.

R. W. WALKER, J.—In considering the propriety of the general charge which the court gave the jury, we place out of view, without inquiring into its admissibility,

the evidence of the declarations of Nunn, to the effect that the note sued for was to be returned to the plaintiff, on his repayment of the money borrowed from Nunn. We do this, because, in our opinion, the result is the same, whether that evidence be regarded or not.

It was undoubtedly competent to prove the consideration upon which the endorsement was made. Indeed, no objection was made to the evidence that the note was endorsed and delivered to Nunn as collateral security for the plaintiff's note to him. Nor can it be doubted that, as between the original parties to the endorsement and their legal representatives, the payment by the plaintiff of his note to Nunn operated, *propria vigore*, a retransfer to the plaintiff of the entire beneficial interest in, and of the right to the possession of the note on Wagner.—Appleton v. Donaldson, 3 Barr, 381, 388; Ins. Co. v. Smith, 11 Penn. 120, 127.

It is true that, as the law stood before the Code, a suit against the maker of the note, for the recovery of the money due on it, would have to be brought in the name of the endorsee. But this does not prove that the property in the note itself, or the right to the possession of it, would belong to the endorsee. The Code provides, that actions upon contracts for the payment of money must be in the name of the party really interested. Until this change in the law, the property in a note, and the right to possession of it, might belong to one person, although a suit upon the note, against the maker, would have to be brought in the name of another. Thus, if the payee of a note should, for a valuable consideration, transfer it by delivery to another person, and should afterwards obtain possession of it by finding, or otherwise; it cannot be doubted, that both the property and the right of possession would be in the transferee; and if the payee should refuse to deliver it on demand, he would be liable in trover at the suit of the transferee.

The proof showed, that the plaintiff demanded the note of the defendant before the suit was brought, and that the latter refused to deliver it. We think that, on the facts, trover can be maintained.—See Donnell v. Thompson,

Clark, Austin & Smith v. Cilley.

13 Ala. 444; Clowes v. Hardy, 12 Johns. 486; Lowmore v. Berry, 19 Ala. 130.

Judgment reversed, and cause remanded.

CLARK, AUSTIN & SMITH vs. CILLEY.

[ATTACHMENT AND GARNISHMENT—CONTEST WITH TRANSFERREE.]

1. *What constitutes assignment of note, as against attaching creditor.*
Where a debtor places promissory notes, payable to himself, in the hands of an agent, with written instructions to collect them, and to pay over the proceeds to certain specified creditors, this does not amount to an assignment or transfer of the notes, either to the specified creditors, or to a surety who afterwards pays their debts, as against a subsequent attaching creditor.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. ROBERT DOUGHERTY.

THE appellants in this case sued out an attachment against the estate of Lorenzo Dow on the 22d December, 1857, and summoned Thomas C. Bragg, by process of garnishment, as the debtor of said Dow. The garnishee answered, "that he was indebted to said Dow, at the time of the service of the garnishment, by two promissory notes; one dated the 27th July, 1857, and due one day after date, for \$108 16; the other, for \$83 33, dated the 27th July, 1857, and due on the 1st January, 1858. Garnishee says, that within two weeks after said garnishment was served on him, knowing that said notes were left by Dow in the hands of Judge Williams, he went to said Williams, and told him that he had been garnisheed in this case; and said Williams then told him, that said Dow had left the notes with him, and authorized him to collect them, and to pay the money to other parties, whose names garnishee cannot now recollect. Garnishee has

been since informed, that said notes were left by Dow with said Williams for the purpose of protecting P. N. Cilley and H. H. Whetstone, who were sureties for said Dow on certain notes in the hands of B. J. Harrison." Cilley and Whetstone were thereupon summoned, to contest with the plaintiffs the right to the money due on the notes; and an issue was made up between them, as provided by the statute. On the trial of this issue, as the bill of exceptions shows, the plaintiffs read in evidence the answer of the garnishee, and the contestants then introduced said Williams as a witness, who testified as follows: "On the 28th July, 1857, as Dow was about leaving for Kansas, he placed in the hands of witness certain notes, among which were the notes described in the garnishee's answer; and told witness, that he did so for the purpose of paying a note for \$350, due to B. J. Harrison, on which P. N. Cilley was surety, another note to said Harrison, for \$31, on which H. H. Whetstone was surety, \$58 to Mr. Gresham on a note held by him, and the balance to the plaintiffs in this attachment; and, at the same time, gave witness a writing, signed by said Dow, in these words: 'Pay B. J. Harrison \$350 for servant hire, on note due 1st January next, and \$31 now due; pay Mr. Gresham \$58, and take up note which he holds against me; and pay balance to the order of Clark, Austin & Smith, New York.' Shortly after this, and before Dow left the country, and before plaintiffs' attachment had issued, witness saw said Cilley, and informed him of what Dow had done; and Cilley said that he was satisfied with the arrangement, and took no steps to prevent Dow from leaving the State, or to secure the debt on which he was liable. No person was present at the time Dow placed said notes in witness' hands. In March, 1858, Cilley was compelled to pay the money to Harrison on said notes." This being all the evidence, the court charged the jury, that they must find for the contestants; to which charge the plaintiffs excepted, and which they now assign as error.

CLEMENTS & WILLIAMSON, for the appellants, cited Drake on Attachment, § 525; Baker v. Moody, 1 Ala. 315; Mar-

Clark, Austin & Smith v. Cilley.

dis v. Shackelford, 6 *ib.* 433; West v. Foreman, 21 *ib.* 400; Mitchell v. Allen, 10 Maine, 450; Clayton v. Fawcett, 2 Leigh, 19; Brownlee v. State, 2 Spear, 519.

THOS. WILLIAMS, *contra*, cited Brooks v. Hildreth & Mosely, 22 Ala. 469.

A. J. WALKER, C. J.—The defendant in attachment delivered notes, payable to himself, to his agent, with instructions to collect them, and to pay over the money on certain debts due by him. Before the money was collected, some of the debts so placed in the hands of the agent for collection were attached, at the instance of a creditor of the party who placed them in the hands of the agent. Sureties who have in the mean time paid off one or more of the debts, to the payment of which the money when collected by the agent was to be appropriated, contest the liability of the debts placed in the agent's hands to be attached.

The delivery of the notes to an agent, with instructions to pay the money, when collected, on certain debts, did not transfer the right to those notes, either to the creditor whose debt was to be paid with the money when collected, or to a surety upon the debt. There was no transfer whatever. Instructions were given, which might have been revoked at any time, before the agent acted in pursuance of them. The intention was, that the money, when collected, should be delivered to the specified creditors; not that the notes should be transferred.—Mardis v. Shackelford, 6 Ala. 433; Baker v. Moody, 1 *ib.* 315. The agent had no authority to deliver or transfer the notes. When one receives money, to be delivered to another, and that other assents, the right to the money at once vests in the party to whom the delivery was to be made.—Brooks v. Hildreth & Moseley, 22 Ala. 469. But the case here is obviously different. The title to the notes remained in the defendant in attachment, and the judgment should have been against the garnishee, in favor of the plaintiffs in attachment.

The judgment is reversed, and the cause remanded.

WILSON vs. WILSON.

[FINAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.]

1. *Incompetency of probate judge from interest.*—Where the probate judge is one of the sureties on an administration bond, he is incompetent from interest to preside on the settlement of the administration, or to make any order affecting the liability of the administrators under their bond; and if one of the administrators is also the guardian of the sole distributee of the estate, and the administration has never been settled, he is also incompetent to preside on the settlement of the guardian's accounts; and if the guardianship has never been settled, although the guardian has been removed, he is equally incompetent to preside on the settlement of the accounts of the succeeding guardian, who is sought to be charged with negligence in failing to collect from his predecessor assets belonging to the estate of his ward.
2. *Jurisdiction of circuit court, and of register in chancery, in causes transferred from probate court.*—The jurisdiction of the circuit court under the act of 1850, (Session Acts 1849-50, p. 36, § 40,) and of the register in chancery under the Code, (§§ 560, 1910-12,) in causes transferred from the probate court on account of the incompetency of the probate judge, is special and limited; consequently, the record in a transferred cause must affirmatively show the jurisdiction of the court to which the transfer is made.
3. *Same.*—If the record in a transferred cause recites the jurisdictional fact which authorized the transfer, the recital is conclusive in a collateral proceeding, and the validity of the subsequent orders and decrees cannot be impeached on account of irregularities; but a simple recital of the legal conclusion, that the probate judge "is incompetent," without stating the fact from which the incompetency results, is not sufficient to support the jurisdiction.

APPEAL from the Probate Court of Shelby.

IN the matter of the final settlement of the accounts and vouchers of John B. Wilson, as guardian of Martha J. Wilson, his ward. Martha J. Wilson was the sole distributee of the estate of H. H. Wilson, her deceased father, who died, intestate, in 1841. In September, 1841, the orphans' court of Shelby appointed John W. Roper and Benjamin F. Randall, as administrators of the estate of

said H. H. Wilson, and accepted and approved their official bond, with Samuel Brasher, J. B. Wilson, and J. M. McClanahan, as sureties. On the 11th October, 1841, said Benjamin F. Randall was also appointed by said orphan's court, as guardian of said Martha J. Wilson; gave bond, with D. E. Watrous and A. J. Wells as sureties, and entered on the discharge of his duties as such guardian. John W. Roper died in 1846, before there had been a final settlement of the joint administration of himself and Randall on the estate of Wilson; and Joseph Roper, D. N. McClanahan, and Mrs. E. M. Roper, duly qualified as executors and executrix of his last will and testament. In 1849, Randall, as surviving administrator, and the executors of Roper, were cited by the orphans' court to settle the administration of said Randall and Roper on the estate of said Wilson; and on the 16th July, 1850, before the Hon. J. M. McClanahan, probate judge, this settlement was transferred to the circuit court; the record reciting, "the judge of this [probate] court being incompetent to make said settlement." On the same day, the application of Randall's sureties to require him to give a new bond was also transferred to the circuit court; the record containing a similar recital as to the incompetency of the probate judge.

In the circuit court, at its September term, 1851, on final settlement by Roper's executors of their testator's administration on the estate of H. H. Wilson, a decree was rendered against said executors, in favor of B. F. Randall, as guardian of Martha J. Wilson, for \$1365; and it was further ordered, that the settlement of Randall's administration on said estate be remanded to the probate court. This entry contains the following recital: "The judge of the probate court of said county, from incompetency to settle this administration, (he having been one of the executors of John W. Roper's last will and testament,) having transferred this settlement from the probate court to this court, the same came on to be heard," etc. On the same day, the circuit court made another order, discharging McClanahan and Brasher from their liability as

sureties on Randall's bond as guardian, and accepting from him a new bond, with other sureties.

In the probate court, on the 4th August, 1853, before Judge McClanahan, the settlement of Randall's guardianship, and an application for the revocation of his letters of guardianship, were transferred to the register in chancery; the order reciting, "the judge of this court being incompetent to try the same." On the same day, the final settlement of Randall's administration on the estate of said Wilson was also transferred to the register in chancery; the order containing this recital, "The judge of this court being incompetent to try the issues and pass upon said settlement." On the 10th January, 1854, before the register in chancery, a decree was rendered against Randall, on final settlement of his accounts and vouchers as administrator, in favor of Martha J. Wilson as sole distributee, for \$7,755; and on the 18th June, 1855, on final settlement of his accounts as guardian, a decree was rendered against him for \$8,813 26, being the amount of the decree against him as administrator, with interest thereon. In each case, the entry recites, that the register is "sitting as judge of probate under the Code of Alabama, the judge of probate being incompetent in this case, and the case being transferred." Divers other proceedings were had before the register in chancery, in the matter of the guardianship; but the record is so confused that it is impossible to state them accurately, and at the same time intelligibly.

In the probate court, before Judge McClanahan, on the 31st October, 1856, a citation was ordered to issue against Randall, commanding him to appear and show cause why his letters of guardianship should not be revoked; and at the November term, 1856, he having failed to appear in answer to the citation, his letters were revoked, and he was ordered to make a final settlement of his accounts on the 2d Monday in December then next. On the 13th November, 1856, John B. Wilson was appointed by said probate court, as guardian of said Martha J. Wilson; gave bond, and duly qualified. In August, 1857, said Wilson having failed to give a new bond, on the requisi-

tion of his sureties, his letters of guardianship were revoked, and he was cited to make a final settlement of his accounts on the 2d Monday in September, 1857. The settlement was brought to a hearing at the March term, 1858, of the probate court; and the case is brought to this court by appeal from the decree of the probate court.

Before the settlement of the accounts was commenced, the guardian filed written objections to the competency of Judge McClanahan to preside on the settlement, "on the ground that he was one of the sureties of Benjamin F. Randall on his official bond as administrator of H. H. Wilson, deceased; and that the assets of said estate, which had come to the hands of said Randall as administrator, had never been paid over to any one authorized by law to receive them." In support of his objections, the guardian read in evidence the order appointing said Randall and Roper as administrators of said Wilson, together with their official bond, and all the proceedings had in the probate court up to the time when the administration was transferred to the register in chancery; also, the various proceedings of the probate court, in the matter of Randall's guardianship, up to the time when it was transferred to the register in chancery, and all the orders and decrees made by the register in connection with the settlement of the administration and guardianship. To rebut this evidence, the ward then read in evidence the record and proceedings of the circuit court of Shelby, in the matter of the settlement before that court of Roper's administration on said Wilson's estate. To the admission of this evidence the guardian objected, "because it was illegal and irrelevant, and because said circuit court had no jurisdiction to make said orders and decrees." The court overruled the objections to the evidence, and to the competency of the presiding probate judge; and to each of these decisions the guardian excepted.

The ward sought to charge the guardian with the amount of the decree rendered in her favor, by the register in chancery, on the 18th June, 1855, on the final settlement of Randall's guardianship, and, for this purpose, offered in evidence the proceedings had before the or-

phans' and probate court, and before the register in chancery, in the matter of Randall's guardianship. The guardian objected to the admission of these records as evidence, "because said orphans' or probate court of Shelby had no jurisdiction to appoint a guardian for Martha J. Wilson, and the record did not show that it had jurisdiction; because the register in chancery had no jurisdiction of said guardianship, and was not authorized to make any valid order or decree therein; because the order transferring said guardianship to the register in chancery conferred no jurisdiction on him, and because said proceedings were wholly null and void." The court overruled these objections, and permitted the record to be read, and also charged the guardian with the amount of said decree; to each of which rulings and decisions the guardian excepted.

The rulings of the probate court above stated, with numerous other decisions to which exceptions were reserved by the guardian, are now assigned as error.

J. R. JOHN, with BROOKS & GARROTT, for appellant.

S. LEIPER, with JOHN T. MORGAN, *contrâ*.

STONE, J.—In the present case, we have to deal with two guardianships, two administrations, one suit in chancery, two or more transfers from one court to another, and several renewals of bonds. Hence, if the record had been made out with the strictest regard to method, the questions presented would necessarily have been complicated. The complication of the case, however, is much increased, by a very great disregard, in the preparation of the record, of the proper connection of both subjects and dates. We forbear to particularize, but feel justified in saying, that should another record come before us in the condition in which we find the present one, we will, *ex mero motu*, reject the record, without costs for its preparation, and require a correct one to be made by the officer on whom the duty rests.

The direct questions presented for review in the present record, arose on the final settlement of John B. Wilson,

the appellant, of his guardianship of the person and estate of Martha J. Wilson, the appellee. Several preliminary questions, however, arose. Among them is the charge, that the presiding judge of the probate court of Shelby was interested in the subject-matter of the settlement, and therefore incompetent to try the cause. To make out this interest, the appellant is forced to take, and does take another position—to-wit, that certain proceedings in the probate court, in the circuit court of Shelby, and before the register in chancery for that county, hereafter noticed, are void.

The claim of Miss Martha J. Wilson consists of moneys and effects in the hands of her former or present guardian, or in the hands of the administrators of the estate of her father, H. H. Wilson, from whose estate the property came. In 1841, Benjamin F. Randall and John W. Roper were appointed administrators of said H. H. Wilson's estate, and gave a joint bond; and the present probate judge of Shelby county, we suppose, became one of their sureties on said administration bond. Being, as we suppose, at one time bound as the surety of Randall and Roper, it follows that, unless he has been discharged as such surety, he is incompetent from interest to preside in any trial or controversy, the result of which will be to fix a liability on said administrators, or to discharge them from such liability. In such contest he has such an interest as not only disqualifies him from presiding, but would render any judgment pronounced by him void,—Act of 1850, Pamph. Acts, 36, § 40; Code, § 560; State, *ex rel.* Claunch v. Castleberry, 23 Ala. 85; Heydenfeldt v. Towns, 27 *ib.* 423, 439.

All the orders and judgments had and rendered in this cause, since the first stages of the administration, and since the appointment of the first guardian for Miss Wilson, after noticed, have been during the official term of the present probate judge. It follows from the rule above laid down, that Judge McClanahan, if one of the sureties, was incompetent from interest to make any order, which affected the liability of the administrators, under their bond to which he was a surety.—Lyon v. State Bank,

1 Stew. 442, 463-4; Lister v. Vivian, 8 Porter, 375; Woodruff v. Bank, 4 Ala. 294; Bond v. Smith, 2 *ib.* 660; Earl of Derby's case, 12 Coke, 114; Dimes v. Grand Junction Canal Co., 16 Eng. Law & Eq. 63; Bank v. Fitzsimmons, 2 Bin. 454; Steamboat Company v. Livingston, 3 Cowen, 724; Underhill v. Dennis, 9 Paige, 202; Paddock v. Wells, 2 Barb. Ch. 331; Palmer v. Lawrence, 1 Sel. 389; Nettleton v. Nettleton, 17 Conn. 542; Hawley v. Baldwin, 19 *ib.* 585; Murphy v. Barlow, 5 Por. (Ind.) 230; Knight v. Hardeman, 17 Geo. 260; Pearson v. Hopkins, 1 Pen. (N. J.) 195; Ten Eyck v. Simpson, 11 Paige, 177.

In 1850, Mr. Roper having died, his representatives filed their account-current in the probate court, for final settlement of his administration. At the same time, certain of the sureties moved in said court that B. F. Randall, the other administrator, be required to renew his bond as administrator, and thus to discharge them. Notices of these applications were given; and the judge of probate, stating in his orders that he was *incompetent*, in the one case "to make said settlement," and in the other, "to adjudicate the same, and pass on said settlement," transferred both of said cases and questions to the circuit court for adjudication.

In the circuit court of Shelby county, at the fall term, 1851, said final settlement was taken up, and disposed of; the judgment entry reciting—"The judge of the probate court of said county, from incompetency to settle this administration, he having been one of the executors of said John W. Roper's last will and testament, and having transferred this settlement from said probate court to this court, the same came on," &c. A decree was thereupon rendered, in favor of said B. F. Randall, as surviving administrator, against the executors of John W. Roper, which, the record tends to show, was afterwards paid up.

At the same term, and in the same order, the circuit court took and approved a new administration bond from said B. F. Randall, with G. M. Randall, Lewis Bowdon, and J. A. Simpson, as sureties; and discharged J. M. McClanahan and Samuel Brasher as sureties of said Randall

on his administration bond. These orders bear date 13th September, 1851.

The two orders last noticed—the settlement of John W. Roper's administration, and the taking of the new bond, with the discharge of the sureties, McClanahan and Brasher—were made under the act approved Feb. 11th, 1850,—Pamph. Acts, 36.

The authority of the circuit court, under the act of 1850, and of the register in chancery, under section 560 of the Code, to adjudge controversies which belong of right to the probate court, is of the class called limited and statutory. To uphold the jurisdiction, the record must affirmatively show the right of the court to proceed in the given case.—*Lister v. Vivian*, 8 Porter, 375; *Woodruff v. Bank*, 4 Ala. 292; *King v. Shackelford*, 13 *ib.* 435; *Talliaferro v. Brown*, 11 *ib.* 702; *Hall v. Wilson*, 14 *ib.* 295; *Butler v. Foster*, *ib.* 323; *Reynolds v. Reynolds*, 11 *ib.* 1023; *Willis v. Willis*, 9 *ib.* 330; *Brazeale v. Brazeale*, *ib.* 491, 496; *Cloud v. Barton*, 14 *ib.* 347; *Taliaferro v. Bassett*, 3 *ib.* 670; *Robinson v. Steele*, 5 *ib.* 473; *Clarke v. West*, *ib.* 117; *Lambeth v. Garber*, 6 *ib.* 870; *Bishop v. Hampton*, 15 *ib.* 761; *Bond v. Smith*, 2 *ib.* 660; *Driver v. Huds-peth*, 16 *ib.* 348; *Jenkins v. Jenkins*, 16 *ib.* 693; *Willis v. Willis*, *ib.* 652; *Croft v. Ferrill*, 16 *ib.* 351.

The questions arising on the orders made in the circuit court of Shelby, came up collaterally in the trial of this cause in the court below; and hence, if that court acquired jurisdiction of the questions, we need not inquire whether the after proceedings were regular, or free from error. Irregularity of proceedings could only be noticed on direct appeal; want of jurisdiction would render the proceedings void.—*Wyman v. Campbell*, 6 Porter, 219; *King v. Kent*, 29 Ala. 542; authorities collected in *Hunt v. Ellison*, opinion of Stone, J., 32 Ala. 193; *Key v. Vaughn*, 15 Ala. 497; *Willis v. Willis*, 16 *ib.* 652; *Davis v. Davis*, 10 *ib.* 299.

The order of transfer to the circuit court, the validity of which we are considering, was made under the 40th section of the act of 1850, which, after declaring that no judge of probate shall act upon the determination of any

cause or proceeding, &c., in which he is interested, &c., proceeds to direct that, in such cases, the cause or proceeding shall be commenced, or transferred, as the case may be, to the circuit court of the proper county, &c. In the present case, the circuit court recited in its judgment entry, that the judge of probate was incompetent to settle this administration, he having been one of the executors of said John W. Roper's last will and testament. We can not, in this proceeding, inquire whether this recital is true or false. It was a judicial ascertainment of the fact necessary to give the court jurisdiction; and inasmuch as, under the act of 1850, the proceedings may be commenced in the circuit court, when the probate judge is interested, the recital gave the circuit court jurisdiction.—See *Hamner v. Mason*, 24 Ala. 480; *King v. Kent*, *supra*; *Heydenfeldt v. Towns*, 27 Ala. 431; *Hamilton v. Williams*, 26 *ib.* 584. Hence, we need not in this place inquire whether the order of transfer made by the probate court was or was not sufficient.

It results from what we have said, that the orders and decrees made by the circuit court were not void, and that on this settlement they were conclusive. This includes the final settlement of Roper's administration, the new bond taken from Randall, and the discharge of the sureties.

Looking into the record, we suppose that the recital that the probate judge was one of the executors of John W. Roper's will is an error. He seems to have been one of the sureties on the bond of Randall and Roper as administrators of H. H. Wilson's estate. This as effectually disqualified him from presiding on the settlement of either of said administrations, as did the cause recited by the circuit court. This disqualification extended farther, perhaps. The discharge of the sureties of the first administration, or first guardianship, did not necessarily absolve them from liabilities incurred before their discharge.—See *Williams v. Harrison*, 19 Ala. 277, 284-5; *Hamner v. Mason*, *supra*; *Carroll v. Moore*, 7 Ala. 615; *Phillips v. Brazeale*, 14 *ib.* 746; *Chilton v. Parks*, 15 *ib.* 671. Serious questions may, and probably will, arise in the settlement of Benjamin F. Randall, as administrator of the estate of

H. H. Wilson, deceased, and of his guardianship of Martha J. Wilson, which will, directly or indirectly, affect his sureties on the first administration bond. We confess ourselves the advocates of the doctrine, that judicial officers should abstain from the trial of causes in which they have the smallest pecuniary interest. Nothing so upholds civil society, so challenges public confidence, as a pure and incorruptible judiciary.—Hawley v. Baldwin, 19 Conn. 585; Ten Eyck v. Simpson, 11 Paige, 177; State, *ex rel.* Claunch v. Castleberry, *supra*.

In the present case, assuming that the probate judge was one of the sureties on the first administration bond, (of which fact the identity of name is the only evidence,) we think he rightly declined to entertain jurisdiction of the settlement of the administration, and of the settlement of Randall's guardianship, which necessarily brought up the question of the discharge of the administrators. In other words, Randall's liability as guardian, and the extent of it, depended on the extent to which he had administered on the estate in his hands, and had transferred the funds from the administration to the guardianship. Davis v. Davis, 10 Ala. 299; Childress v. Childress, 3 *ib.* 752; McLane v. Spence, 6 *ib.* 894; Duffee v. Buchanan, 8 *ib.* 27; Purdom v. Tipton, 9 *ib.* 914; King v. Shackelford, 13 *ib.* 435; Williams v. Harrison, 19 *ib.* 277, 284-5.

The subsequent orders of transfer of the settlement of Randall's administration, and of his guardianship, were made under the provisions of the Code, which read as follows: "§ 560. No judge of any court, chancellor, county commissioner, or justice, must sit in any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or in which he has been of counsel, without the consent of the parties, entered of record, or put in writing if the court is not a court of record." Sections 1910, 1911, 1912, of the Code, point out the mode of proceeding in such cases.

The orders of transfer in these cases, made by the judge of probate, simply recite that the judge is incompetent, without stating any fact, or conclusion of fact, which

shows the incompetency. Incompetency to preside is a conclusion of law from given facts. If the order had recited, that the judge was interested in the settlement, had been of counsel, &c., this would have brought the case directly within the statute, and would have supported his conclusion that he was incompetent. There is nothing in the proceedings before the register which aids this imperfect certificate of the judge of probate. The only mention there made of the subject is, that the judge of probate is incompetent, and that he, the register, is sitting for the judge of probate. This is insufficient, under the rule above laid down, to sustain a limited, special, statutory jurisdiction.—Butler v. Butler, 11 Ala. 668; Hartley v. Bloodgood, 16 *ib.* 233; Cullum v. Branch Bank, 23 *ib.* 797; Keiffer v. Barney, 31 *ib.* 193; Clark v. Gilmer, 28 *ib.* 285; Dow v. Whitman & Ousley, at present term.

From the principles above stated it results, that neither the administration of the said Randall, nor his guardianship for Miss Wilson, has ever been settled, because the register in chancery never acquired rightful jurisdiction of said settlements.

It does appear, however, that Mr. Randall was removed as guardian, after proper notice, by an order of the probate court, made at the November term, 1856. This order appears regular, and there is nothing in the record which shows the probate judge disqualified by interest or other cause from making the order. It also appears that John B. Wilson was regularly appointed guardian for Martha J. Wilson, by the judge of probate, and his bond approved Nov. 17th, 1856; and that his letter of guardianship was revoked by the same authority, at the August term, 1857. It is thus shown that John B. Wilson remained guardian for Miss Wilson, between eight and nine months. It is not necessary we should inquire in this case what diligence he did or did not employ in collecting, or attempting to collect, *supra*, the property of his ward. See Williams v. Harrison, *supra*. It is manifest that much of the evidence against him on the trial of this cause, consisted of proceedings before the register, which were void; and that without those proceedings, the evidence

did not justify the decree which was rendered. Hence, we deem it unnecessary to consider any other questions.

Whether the present appellant has incurred any liability, by failing to recover the property or moneys of his ward, while he was her guardian, we do not determine. All we decide is, that the evidence in this record does not support the decree; and that in the condition in which the administration of H. H. Wilson's estate now stands, the present probate judge of Shelby county, if he was a surety on the first administration bond of Randall and Roper, is incompetent to preside on this settlement.

The decree of the probate court is reversed, and the cause remanded.

A. J. WALKER, C. J., not sitting.

OVERSTREET *vs.* NUNN'S EXECUTORS.

[ACTION ON COMMON MONEY COUNTS.]

1. *When action lies for money had and received.*—When a debtor transfers and endorses to his creditor, as collateral security, a note on a third person, and afterwards pays his original debt in full, he may maintain an action at law against the creditor, to recover money collected on the transferred note before the payment of the original debt.

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. PORTER KING.

THIS action was brought by James Overstreet, against L. B. Parker and M. C. Nunn, who were the executors of William Nunn, to recover money collected by them, as such executors, from one Wagner, on a promissory note which the plaintiff had transferred and delivered to said

Nunn as collateral security. The facts of the case are the same as in the other case between the parties, reported on page 649; and the bills of exceptions in the two cases are substantially, if not literally, the same. The money was collected by the defendants after the maturity of Wagner's note, but before the payment by plaintiff of his original debt to Nunn. The court charged the jury, that the plaintiff could not recover at law. The plaintiff excepted to this charge, and he here assigns it as error.

WATTS, JUDGE & JACKSON, for the appellant.

WM. L. YANCEY, with WM. H. NORTHINGTON, *contra*.

R. W. WALKER, J.—Putting out of view the evidence tending to show that the endorsement was made subject to the condition, that the note was to be returned to the plaintiff, on his repayment of the money borrowed from the defendant, it is plain that, on the undisputed facts, as disclosed by the bill of exceptions, the plaintiff was entitled to the money which the defendants had collected of Wagner. The note was endorsed and delivered to Nunn, as collateral security for the repayment of the money which he had loaned to the plaintiff. If this borrowed money had been repaid, before the defendant received the one thousand dollars paid by Wagner, this latter sum would very clearly have been considered as so much money deposited with the defendant, to be paid to the plaintiff. The right of the plaintiff to the sum thus received by the defendant, is not less perfect, because the borrowed money was repaid after the payment made by Wagner to the defendant. As soon as the sum loaned was repaid by the plaintiff, he became entitled, in justice and equity, to the amount which the defendant had collected from Wagner. The case falls clearly within the rule, that when one man has *money* in his possession, which, *ex æquo et bono*, belongs to another, the latter may maintain an action in his own name to recover it, and the law implies the privity and promise.—*Sherrod v. Hampton*, 25 Ala. 652; *Hitchcock v. Lukens*, 8 Porter, 333; *Huckabee v. May*, 14 Ala. 263; *Boyd v. Taliaferro*,

Welsh and Wife v. Pounders and Wife.

13 Ala. 424; Vincent v. Rogers, 30 Ala. 475; Thompson v. Merriman, 15 Ala. 168; Price v. Pickett, 21 Ala. 741; Sessions v. Sessions, 33 Ala. 522; Williamson v. Culpeper, 16 Ala. 211, 213.

Judgment reversed, and cause remanded.

WELSH AND WIFE *vs.* POUNDERS AND WIFE.

[CONTESTED PROBATE OF WILL.]

1. *What law governs revocation of will.*—The question whether a will, executed in 1851, is impliedly revoked by a sale and conveyance of the land devised by it in 1856, must be determined by the provisions of the Code of 1853.
2. *What constitutes implied revocation of will.*—Under the Code, (§ 1602,) a sale and conveyance of land by the testator, after the execution of his will, does not operate as a revocation of a devise of the land, when the purchase-money is unpaid at the time of his death, “unless it clearly appears by the contract, or some other instrument in writing, to be intended as a revocation.”

APPEAL from the Probate Court of Franklin.

IN the matter of the last will and testament of Ann Thomas, deceased, which was propounded for probate by James H. Welsh and Sarah Ann Elizabeth, his wife, (formerly Sarah Ann Elizabeth Hamilton,) and was contested by Alfred Pounders and Mildred M., his wife. The will was dated the 10th May, 1851, and contained but two clauses; one devising a tract of land, which was particularly described, to Sarah Ann Elizabeth Hamilton and Mary Susan Hamilton; and the other bequeathing ten dollars to Mildred M. Pounders. The due execution and attestation of this paper were admitted, and also that the testatrix died in May, 1857; but the contestants insisted, that the will was revoked, as to the devise of the land, by

a sale and conveyance thereof by the testatrix, in September, 1856, to one Wheeler; and this was the only objection urged against the probate. It appeared that Wheeler, the purchaser, gave his note, under seal, for the purchase-money, payable on the 1st January, 1857; and that no portion of the note was paid at the death of the testatrix. The probate court decided, that this sale and conveyance of the land operated as a revocation of the will, so far as the devise was concerned, and therefore admitted the paper to probate only as to the legacy of ten dollars; and this decision, to which Welsh and wife excepted, is now assigned as error.

J. B. MOORE, for appellants.

WILLIAM COOPER, *contra*.

A. J. WALKER, C. J.—The will in this case was executed before the adoption of the Code, but the testatrix died afterwards. A deed, made by the testatrix in 1856, after the Code went into operation, conveyed to a purchaser the land devised by one of the clauses of the will, and the purchase-money is unpaid. The effect of that deed, in reference to the revocation of the devise, must be determined by the Code, which was the law at the time of its execution.

[2.] Section 1602 of the Code so clearly defines the effect of the deed, that argument cannot be necessary on the point. It does not appear by the contract evidenced by the deed, or by any other instrument of writing, that the testatrix intended to revoke the devise of the land conveyed by it. It follows, that the clause of the will devising the land is not revoked, and the devisees take under the devise the rights specified in section 1602, above referred to. Without farther comment, we refer to *Powell v. Powell*, 30 Ala. 697, the decision in which covers all the questions arising in this case.

The decree of the court below is reversed, and the cause remanded.

DILLARD vs. SCRUGGS.

[ACTION ON OPEN ACCOUNT FOR SERVICES RENDERED IN SALE OF SLAVES.]

1. *Admissibility of declarations qualifying and explaining receipt of money.*—The declarations of a party, made at the time of receiving money, are admissible evidence for him, for the purpose of showing that he did not receive the money as a payment in full of all demands.
2. *What constitutes partnership.*—The fact that a negro-trader, in whose sales-house slaves are exhibited for sale and sold by the owner, charges half-commissions for the use of his house, does not constitute him a partner with the owner in the sale.
3. *Construction of statute prohibiting sale of slaves by unlicensed negro-trader.*—The statute prohibiting a sale of slaves by an unlicensed negro-trader, and declaring such sale void, (Code, §§ 397, 399, 400,) does not prevent a negro-trader, in whose sales-house slaves are exhibited for sale and sold by the owner, from recovering by action the half-commissions to which, by the custom of the trade, he is entitled in such case.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Frederick Scruggs, against Gaston Dillard, to recover the sum of \$300, alleged to be "due from defendant to plaintiff, by account, for services rendered by plaintiff to defendant, and at his request, in and about the sale of certain slaves." The defendant pleaded, in short by consent, the general issue, set-off, and payment. "On the trial," as the bill of exceptions states, "the plaintiff introduced one Magee as a witness, who testified, that plaintiff was a negro-trader in 1856, and had a house and yard in the city of Mobile where negroes were exhibited for sale; that the defendant had several slaves for sale at said house, which were exhibited in the same way that plaintiff's slaves were; that he (witness) saw them all together, and purchased from defendant his said negroes, at the said house, and paid him eight or ten thousand dollars for them. Said witness stated, on cross-

examination, that defendant came to him, some time in 1856, to hire or sell some negroes who were then in the country, and whom he was about to bring to Mobile; that he was afterwards informed that the negroes were at plaintiff's sales-house, and went there to see them,—once with defendant, and twice alone; that on one of these occasions, (he did not remember, but thought it was one of the latter,) some questions being asked about the defendant's negroes, plaintiff said, 'Have nothing to do with those negroes, but take two I would like to sell you'; and that these were the negroes afterwards purchased by him from defendant, and for which he paid eight or ten thousand dollars, as testified by him on his examination in chief. The plaintiff then introduced one Faulkner as a witness, who testified, that the defendant gave him a certain sum of money, after the sale of said negroes to Magee, and requested him to pay it for him to plaintiff, and to take a receipt for the same; and that plaintiff at first refused to take the money. The witness was then asked, what plaintiff said at the time was the reason why he refused to take the money. This question being objected to, the court asked plaintiff's counsel the object of the question, and was answered—first, that witness was defendant's special agent, and what was said to him while acting as such agent was admissible; that a receipt had been given to said agent, for the board of said negroes; and that he expected to show by said witness that, at the time plaintiff received said money from said agent, he told said agent that he was also entitled to commissions on the amount received by defendant for said negroes, independent of their board. The court ruled, that plaintiff's declarations, at the time of receiving the money, were admissible, to show whether he received it in full payment, or only as a partial payment; and that for this purpose, and to this extent, said declarations might be given in evidence; to which ruling the defendant excepted. The witness then stated, that plaintiff said, at the time of receiving said money, that it only paid the board of the negroes, and that he was also entitled to commissions, independent of their board; and to the admission of this evidence

the defendant also excepted. On cross-examination, said witness was shown a receipt for \$200, in full of the board of said negroes; which, he admitted, was the receipt taken by him at the time said money was paid. The plaintiff then offered evidence tending to show, that it was a custom of the trade among negro-traders in Mobile, if the owner effected a sale after they had been put at a sales-house, and while they were there, to charge and receive half-commissions on the amount for which they were sold, unless there was a special agreement to the contrary." The defendant then introduced as a witness the clerk of the probate court of Mobile county, who testified, that since he had been in the office of the probate judge, (since 1853,) the plaintiff had never taken out a license for the sale of slaves; and asked the court to charge the jury, "that if the plaintiff was a negro-trader at the time of the sale of the slaves to Magee, and had not taken out a license pursuant to section 397 of the Code, he could not recover commissions for any part he had taken in the sale." The court refused this charge, and the defendant excepted.

The rulings of the court to which exceptions were reserved, are now assigned as error.

R. B. ARMISTEAD, for appellant.

ANDERSON & BOYLES, *contra*.

STONE, J.—We think there is no error in this record, available to the appellant. The fact that Scruggs received from Dillard's agent \$200 for board of the slaves, and receipted for the same, would probably, if unexplained, have furnished a circumstance which the jury would regard in determining whether or not such payment was in full. Qualified as the ruling of the court in this case was, the declaration of the plaintiff, made at the time he received the money, was very proper, to repel the inference that he regarded the payment as in full of all demands. *Scruggs v. Bibb*, 33 Ala. 481.

[2.] The charge asked and refused, misapprehends the nature of Mr. Scruggs' connection with the sale of the slaves in this case. The half-commissions which he

charged, if a term of the contract, as found by the jury, would not, *per se*, constitute him a copartner with Mr. Dillard. It was, at most, a rate or scale for determining the compensation due to Mr. Scruggs, for the use and privilege of his sales-house.—Smith v. Garth, 32 Ala. 368.

[3.] There is no proof in this record that Mr. Scruggs, in this transaction, acted as a negro-trader, broker, or agent for the sale of slaves.—Books v. Pollard, at the present term.

Judgment affirmed.

COCKRELL vs. COCKRELL.

[APPLICATION FOR REVOCATION OF LETTERS OF GUARDIANSHIP.]

1. *Non-residence of guardian good cause of removal.*—The removal of a guardian from the State being declared by the statute a sufficient cause for the revocation of his letters, (Code, § 2037,) his non-residence at the time of his appointment is necessarily a good cause for his removal, without regard to the age of the ward, or to the refusal of the person afterwards nominated by him to accept the office of guardian.

APPEAL from the Probate Court of Franklin.

IN the matter of the petition of Washington P. Cockrell, an infant, suing by his next friend, for a revocation of the letters of guardianship formerly issued to Sterling R. Cockrell. The petition alleged, that the said Sterling R. Cockrell had removed to Tennessee since the grant of his letters, and was a resident of that State, and that the petitioner was over fourteen years of age; and he afterwards nominated O. O. Nelson as the guardian of his choice. The guardian appeared, and resisted the application; admitting the fact of his non-residence, but insisting that he had not removed from the State since the

time of his appointment; and Nelson also appeared before the court, and refused to act as such guardian. The court thereupon dismissed the petition, and its decree is here assigned as error.

J. B. MOORE, for appellant.

WILLIAM COOPER, *contra*.

R. W. WALKER, J.—One of the causes, for which the legislature has declared that the judge of probate must remove a guardian, is his removal from the State.—Code, § 2037. The provision that a guardian, who becomes a non-resident after his appointment, must be removed from his trust, necessarily implies that one who is at the time a non-resident should not be appointed. A fact which is declared to be a sufficient reason for the removal of a guardian, duly appointed, is, in the very nature of things, a sufficient reason for not bestowing the appointment in the first place. We have no hesitation in holding, that under our statutes, the appointment of a non-resident, as guardian of a ward residing in this State, is an improvident appointment, which it is the duty of the court to revoke, when proper application is made for that purpose. See *Harris v. Dillard*, 31 Ala. 191–2; *Dupree v. Perry*, 18 Ala. 41; *Eiland v. Chandler*, 8 Ala. 781; *Speight v. Knight*, 11 Ala. 461; *Huie v. Nixon*, 6 Porter, 77.

The Code provides, that “when the minor is over fourteen years of age, he may nominate a suitable person as his guardian, in person; or such nomination may be certified by any justice of the peace to the probate judge.”—Code, § 2013. The ward in this case had reached the age of fourteen years, and nominated a guardian in the manner prescribed; but it appears that the person thus named was not willing to accept the trust. It may be true that, in the absence of some other sufficient reason for the revocation of his authority, the guardian of a ward, who has reached the age of fourteen years, should not be removed, until the ward nominates a suitable person who is willing to accept the appointment; and we might, perhaps, affirm the decree, if it had not been shown that there was ano-

ther legal cause for the removal of the guardian—namely, the fact that he was a non-resident. The letters of the guardian should have been revoked on this latter ground, without regard to the age of the ward, or the willingness of the person nominated by him to accept the trust.

Decree reversed, and cause remanded.

SAWYER vs. WARE.

[TRESPASS AGAINST SHERIFF FOR SEIZURE AND SALE OF PERSONAL PROPERTY.]

1. *Admissibility of judgment for or against purchaser, as evidence for or against vendor; competency of vendor as witness for purchaser.*—In an action of trespass against a sheriff, for seizing and selling plaintiff's property under execution against his vendor, a judgment for or against the plaintiff would not be admissible evidence for or against his vendor in another action; consequently, under section 2302 of the Code, his vendor is a competent witness for the plaintiff.
2. *Competency of transferor as witness for transferee.*—Neither section 2290 of the Code, (which declares the transferor of any contract not a competent witness for his transferee, "to prove the cause of action,") nor the analogous rule settled by several decisions of this court prior to the Code, applies to a case in which the vendor of a manufactured article is offered as a witness for the purchaser, in an action of trespass by the latter, against the sheriff, for seizing and selling the article under execution against the vendor.
3. *Statute of frauds, as to contract for sale of chattels at price exceeding \$200.*—A contract between the lessor and lessee of certain iron-works, to the effect that "the iron made at the furnace should be W.'s [lessor] as fast as it was made, until he was repaid for his advances in money and the rent due," is a contract for the sale of the manufactured iron, and not for the work and labor bestowed in the manufacture; such a contract is within the statute of frauds, (Code, § 1551,) if the amount of the advances and rent exceeds \$200; and the agreement for the discharge of the purchase-money does not show such payment as will take the case out of the statute.

4. *Effect of statute of frauds.*—The statute of frauds prevents the enforcement of a contract within its provisions, unless evidenced according to its requirements; but it does not prevent the voluntary execution of such contract by the parties, nor annul it when thus executed.
5. *When title passes to purchaser, as against execution creditor of vendor.* Under a verbal contract for the sale of an article to be manufactured by the vendor, if the contract is within the statute of frauds, the title does not pass to the purchaser until there has been a delivery to him; and if a valid execution against the vendor is in the hands of the sheriff during the interval between the manufacture and the delivery of the article, the lien of the execution is superior to the title of the purchaser.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. JOHN E. MOORE.

THIS action was brought by Horace Ware, against Henry J. Sawyer, to recover damages for the defendant's tortious seizure and sale, under execution against Clabough & Pool, of nine or ten tons of pig-iron, which the defendant, as sheriff, had seized and sold as the property of said Clabough, and which the plaintiff claimed under a contract of purchase from said Clabough. The execution, under which the defendant justified, was issued on the 2d April, 1858, on a judgment which was recovered against said Clabough & Pool, in favor of one John H. Campbell, on the 17th March, 1858; and which came to the hands of the defendant, as sheriff, on the 3d April, 1858. The levy was made by the defendant, under said execution, on the 23d April, 1858; and the property was sold by him, under the levy, on the 1st Monday in June following, and the proceeds of sale applied in satisfaction of the execution.

"On the trial," as the bill of exceptions states, "the plaintiff offered Samuel Clabough as a witness, who was one of the defendants in said execution. The defendant objected to the competency of said Clabough, as a witness for the plaintiff, because he was interested in said suit in favor of the plaintiff; and because, being plaintiff's vendor, it was against public policy. Said Clabough stated, on his *voir dire*, that the iron in controversy was

made by him at the furnace and iron-works in Shelby county, while in his possession under a lease from the plaintiff; that the terms of said lease were, that he leased said furnace and iron-works from plaintiff, in February, 1858, and hired the negroes, wagons and teams, ore-beds and timber thereunto belonging, for the term of two years, for between eight and ten thousand dollars per annum, payable in equal monthly installments, at the end of each month after the furnace was put in operation; that said furnace and iron-works were out of repair when he leased them, and he did not get them into operation until the 14th April, 1858; that after he had leased said furnace, but before he got the same in operation, plaintiff advanced to him between eight and twelve hundred dollars, in money and provisions, to enable him to put said furnace and iron-works in running order; that these advancements were made upon the agreement, that the iron made at the furnace should be Ware's, as fast as it was made, until he was repaid for his advances and the rent due at the time he (witness) began to operate the furnace; that the lease and hiring were in writing, and notes taken for the amount of the rent and hire, but the contract to let Ware have the iron, in payment of his advancements and the first month's rent, was not in writing; that the iron in controversy was made by him between the 14th and the 23d April, 1858, and was sent by him, at the request of plaintiff, on the wagons and teams hired from plaintiff, to the depot near Columbiana, (which was not on the leased premises,) where it was levied on by the defendant; that he had agreed to let plaintiff have said iron before it was made, and had sent it to the depot at his request, in pursuance to the agreement between them; and that said iron was, therefore, the plaintiff's property when it was levied on. On this showing, the defendant objected to the competency of said witness, on the grounds above stated; the court overruled the objections, and allowed the witness to testify to the same facts before the jury; and the defendant excepted.

“Said witness testified, in addition to the facts above stated, that said iron was worth \$30 per ton, and tha

said contract between him and plaintiff was made in good faith. The defendant then read in evidence the record of the judgment under which said levy and sale were made by him, and the execution issued on said judgment, with the endorsements thereon, showing the levy, return, and satisfaction of the execution. This being all the evidence, the court charged the jury, that if they believed the testimony of said witness, and that there was no fraud in the contract between him and plaintiff, then the title to the iron in controversy vested in plaintiff as soon as it was made, and said iron was not subject to levy and sale under said execution; also, that the putting of said iron on the wagons, at the request of the plaintiff, to be hauled to the depot, was a delivery of said iron to the plaintiff, and vested the right to said iron in the plaintiff under said contract, and said iron would not be subject to said execution. To each of these charges the defendant excepted, and then requested the court to charge the jury, in writing, as follows: 'If the jury believe from the evidence that the contract under which the plaintiff claims the property in suit was by parol, and was to the effect that Clabough would deliver to plaintiff as much of the iron first made at the furnace as would be sufficient to indemnify him for advances made to Clabough; and that the payment of the first month's rent or hire was not due until the end of the first month after the furnace was put to work; and that the furnace was not put to work until the 14th April, 1858; and that the property was all in Shelby county, from the time it was made, until it was delivered; and that the execution against Clabough & Pool went into the hands of the defendant, as sheriff, on the 3d April, 1858, and was in his hands until the time of the levy on the 23d April, 1858; and that said iron was delivered to plaintiff, at said depot, in pursuance of said contract; and that said depot was not on the rented premises,—then the lien of said execution attached to the property, and held it in preference to the plaintiff's claim.' The court gave this charge, but with the following written addition: 'If, in addition to what is given in the foregoing charge, the jury find from the evidence that the

plaintiff advanced large sums of money to Clabough, in order to enable him to manufacture iron, upon the understanding, and with the promise on the part of Clabough, that the first iron made by him at said furnace should be the plaintiff's iron; and that the iron levied on had, in pursuance thereof, been set apart for plaintiff, and started for the depot, in pursuance of plaintiff's request and instructions, before the defendant's levy,—then the jury might find for the plaintiff.' To this additional charge, as also to the refusal of the charge as asked, the defendant excepted."

The rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

B. T. POPE, with S. LEIPER, for appellant.

A. J. WALKER, C. J.—A judgment in the suit of a purchaser of personal property, with a warranty of title, is evidence as to the seller, when the title derived from the latter was in controversy, and he had notice of the suit.—*Mahone v. Yancey*, 14 Ala. 395; *Dupuy v. Roebuck*, 7 *ib.* 484. Only two questions, in reference to the plaintiff's title, could arise upon the facts in this case; and those questions are, whether a sale was made; and if it was made, whether it was valid. The former of those questions brings into controversy the making of the sale, and not the quality of the title derived by a sale; and no judgment, consequent upon the decision of that question, could affect the seller. Neither, in our opinion, would a judgment, in a suit where the controlling question was fraud in the sale, be evidence against the seller. The purchaser is not legally entitled to indemnity from his vendor, for injury resulting from a fraud, in which both participated. In a suit against his vendor, the parties would stand in *pari delicto*, and the law would not lend its aid to the purchaser.—*Gardenier v. Tubb*, 21 Wend. 171; *Rea v. Smith*, 19 Wend. 294; *Seymour v. Beach*, 4 Verm. 493; *Warner v. Percy*, 22 Verm. 155; *Bailey v. Foster*, 9 Pick. 139. The decision in *Nichols v. Patton*, (18 Maine, 231,) which is opposed to those above cited,

bases the conclusion, that the vendor is liable on his warranty for injury sustained by the purchaser in consequence of fraud, upon the doctrine, that a fraudulent deed is good between the parties. The inference in that case from the premises is incorrect. Because a deed is valid *inter partes*, it does not follow, that a party may set up his own fraud for the purpose of showing a breach of warranty. The judgment in this case, if against the plaintiff, would not have been evidence against his vendor; and so, if in favor of the plaintiff, it would not have been evidence in favor of the vendor. The witness was, therefore, not incompetent on account of interest, under the rule set forth in section 2302 of the Code.—Harris v. Plant, 31 Ala. 639.

The decisions in Prewitt v. Lowry, (1 Porter, 101,) Burns v. Taylor, (3 Porter, 189,) and Holman v. Arnett, (4 Porter, 64,) were made long before the adoption of the Code, and not in reference to the rule now governing the question of incompetency for interest. We shall not inquire, whether the conclusion which we have attained is consistent with those decisions; for we can make no other decision than that which we have announced, without marring the system which we are endeavoring to build up under section 2302 of the Code. We think it much more important to apply with accuracy the rule given by the legislature in that section, than that we should follow the decisions referred to by the counsel.

[2.] Section 2290 of the Code declares the transferrer of a contract to be incompetent as a witness for the transferee, suing upon the contract, to prove the cause of action, except in the cases, and under the restrictions therein specified; and before the adoption of the Code, it was held in numerous cases in this State, that the transferrer of a chose in action was an incompetent witness for his transferee, to prove the cause of action transferred. Neither under the Code, nor under the rule announced in those cases, was the witness in this case incompetent; for he was not the transferrer of a contract or chose in action, but, if he transferred anything, it was a chattel in possession.—Kirksey v. Dubose, 19 Ala. 43; Robinson v. Tipton, 31 *ib.* 595; Clifton v. Sharpe, 15 *ib.* 618;

Powell v. Powell, 10 *ib.* 900; Locke v. Nolen, 11 *ib.* 249; Houston v. Prewit, 8 *ib.* 846; Powell v. Powell, 7 *ib.* 582; Maury v. Mason, 8 Porter, 211, 232.

[3.] The contract as proved was, that the plaintiff should have the manufactured iron as fast as it was made, until he was paid for advances in money and provisions to the amount of eight or twelve hundred dollars, and also for a certain proportion of rent. This was a contract of sale, within our statute of frauds. It is often extremely difficult to distinguish between executory contracts for the sale of articles to be manufactured, and contracts for the labor and skill of manufacturing. The authorities are conflicting, and some of them make distinctions much more nice than practical or useful. Without going into a collation of the authorities, we think we may safely decide, that the contract in this case was for the sale of manufactured iron, and not for the work and labor bestowed in manufacturing it.—Cason v. Cheely, 6 Geo. 554; Browne on the Statute of Frauds, §§ 301–310; Smith on Con. 75, n. 1; 2 Story on Con. 1015, *ee.*

The purchase here is of iron, in value sufficient to discharge the specified debts; and the amount of those debts exceeds two hundred dollars. There was, therefore, a sale of chattels, for a price exceeding two hundred dollars, (Browne on Stat. of Frauds, 313;) and the fifth subdivision of section 1551 of the Code requires such a contract to be in writing, unless the buyer accepts and receives part of the thing sold, or pays a part of the purchase-money. The contract in this case was not accompanied by an acceptance of any part of the chattels sold. The price was to be paid by crediting the debts of the purchaser on the seller. The agreement so to discharge the purchase-money was not a payment. The point is correctly so ruled, in Walker v. Nussey, 16 Mees. & Wels. 302.

[4–5.] The court erred in charging the jury, that the title to the iron vested in the plaintiff as soon as it was made. But as soon as a delivery of the iron, or any part of it, was made, the title vested in the purchaser. The statute of frauds prevents the enforcement of a contract, not evidenced according to its requirements, but does not

prevent the voluntary execution of a contract, or annul it when executed, although it may have been made in a manner not conformable to the statute.—Smith on Contracts, 65; Browne on Statute of Frauds, §§ 114, 115, 116. Therefore, if there was a delivery to the plaintiff, of the iron which is the subject of the controversy, the plaintiff's title would vest; but, if there was a valid execution in the hands of the sheriff of the proper county, against the seller, during the interval between the manufacture of the iron and its delivery, the execution creditor would acquire a lien upon it before the title vested, and the title would be postponed to the lien of the execution, and the sheriff would be justified in levying the execution upon it.

Judgment reversed, and cause remanded.

BROOKS vs. CARTER.

[APPEAL FROM JUSTICE'S COURT.]

1. *Practice in appeal cases.*—Ordinary appeal cases from justices' courts are triable *de novo* in the circuit court; and that court may render judgment, on appeal by the defendant, for a larger amount than was recovered before the justice.
2. *What will discharge surety.*—The failure and refusal of the lessor, when required by the lessee's surety, who was bound jointly with his principal by instrument under seal, to proceed by distress-warrant against the lessee, does not discharge the surety from liability.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Jesse Carter, against R. M. Duncan and A. Brooks, and was commenced in a justice's court. The justice rendered judgment for the plaintiff, for \$11 80; and the defendants removed the case, by appeal, to the circuit court. The plaintiff there filed a

complaint, claiming \$25 for rent due him by the defendants, under a lease dated the 30th October, 1858. On the trial, as the bill of exceptions shows, the plaintiff claimed a balance of \$17, as the amount of rent due him; and introduced in evidence before the court the written lease, or writing obligatory specifying the terms of the lease, which was under seal, and signed by both of the defendants jointly. "The defendant Brooks then offered to prove, by parol, that he signed and executed said obligation, not as a principal, or joint lessee with his co-defendant, but only as surety for him; that he was recognized by the plaintiff as a surety for said Duncan; that when the rent was due, he insisted that a distress-warrant should issue against said Duncan for the collection of the rent, and offered to give the necessary bond and security to obtain it; that the plaintiff refused to bring the suit, and the justice refused to issue the process, unless the plaintiff would consent to it, and refused to allow said Brooks to have it issued. The plaintiff objected to all this evidence, on the ground that Brooks was precluded by the lease, which was under seal, from proving that he was only surety, and thus contradicting the lease by parol proof. The court rejected the evidence, and gave judgment for the plaintiff, for \$17, with interest and costs." The judgment of the court, and its ruling on the evidence, to which the defendant Brooks excepted, are now assigned as error.

GEO. N. STEWART, for appellant.

P. HAMILTON, *contra*.

STONE, J.—Appeals from justices' judgments, in ordinary cases, are triable *de novo*, on the facts, and not on errors assigned on the record.—Code, § 2369; Hogan v. Thompson, 2 Porter, 48; McCrary v. Smith, 1 Ala. 157; Waring v. Gilbert, 25 Ala. 295. The recovery, even when the appeal is by the defendant, may be larger than the judgment before the justice of the peace.—Waring v. Gilbert, *supra*.

[2.] We need not inquire, whether the circuit court rightly refused to receive evidence that Mr. Brooks stood

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in the relation of surety to Mr. Duncan. The only use he proposed to make of that fact, if it existed, was, to base on it a right to have the plaintiff proceed by distress-warrant against Mr. Duncan, his principal. Conceding the facts to be as he contends they are, this would give him no right to force the plaintiff to the specific remedy which he desired.—*Branch Bank v. Perdue*, 3 Ala. 409; *Haden v. Brown*, 18 Ala. 641; *Minter v. Branch Bank*, 23 Ala. 672.

Judgment affirmed.

FITZPATRICK vs. HAYS.

[ACTION ON ACCOUNT FOR MEDICAL SERVICES RENDERED.]

1. *Proof of demand by plaintiff's own oath.*—Where the plaintiff proposes to establish his demand by his own oath, (Code, § 2313,) and swears positively to its correctness, the defendant's sworn denial of the facts, "upon the best of his knowledge and belief," is not sufficient to exclude the plaintiff's statement as evidence.
2. *Charge requiring explanation, or calculated to mislead jury.*—The giving of a charge which asserts substantially a correct legal proposition, although calculated to mislead the jury if critically construed, affords no ground for a reversal of the judgment: the party should ask an explanatory charge.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by James A. Hays, against Jesse Fitzpatrick, and was founded on an open account for medical services rendered by plaintiff for defendant, amounting to \$185. The complaint contained all the common money counts. The defendant pleaded—1st, the general issue; 2d, set-off of a promissory note and open account, amounting to about \$20; and, 3d, a special plea

of set-off for the value of several slaves, for whom the plaintiff had rendered professional services as a physician, and who were alleged to have died from his negligent and unskillful treatment. On the trial, as the bill of exceptions shows, the plaintiff introduced the account on which the action was founded, with an affidavit thereto appended, made by himself before the clerk of the circuit court, in these words: "Plaintiff proposes to prove, by his own oath, that the account hereto annexed is correct; that he rendered the services, at the request of the defendant, as a regularly graduated physician; that the charges are reasonable, and such as are usually made by physicians, and that he never has been paid any part of said account." The defendant then submitted an affidavit, in the following words: "Defendant states, upon the best of his knowledge and belief, that the pretended services of the plaintiff, above mentioned, were of no benefit to him, but worked much injury to him; that there was a want of skill, which was injurious to him, and which produced loss to him; and defendant denies the correctness of the plaintiff's foregoing account, and the correctness of the facts asserted in the plaintiff's foregoing proposal." The court held, that the defendant's affidavit was not sufficient to exclude the proposed testimony of the plaintiff, and allowed the latter to testify; to which rulings the defendant excepted.

The rendition of the services charged in the account, the fact that the plaintiff was regularly licensed as a physician, and the correctness of the note and account pleaded as a set-off, were admitted; but there was conflicting evidence on all the other questions in the case. The court charged the jury, at the request of the plaintiff, "that if they believed from the evidence that the plaintiff rendered the services charged in the account, and that said services were rendered at the request of the defendant, and that the plaintiff was not wanting in reasonable skill and diligence in rendering such services, then he is entitled to recover the amount of such services, less the amount of the due-bill and account conceded as a set-off"; to which charge the defendant excepted.

The two rulings of the court above stated, to which exceptions were reserved, are now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for appellant.

WM. P. CHILTON, *contra*.

R. W. WALKER, J.—In the cases embraced by section 2313 of the Code, the plaintiff is competent to establish the correctness of the demand by his own oath, unless the defendant, in open court, “denies upon oath the truth of the facts proposed to be sworn to by the plaintiff.” The statute evidently contemplates, that the denial of the defendant, as well as the statement of the plaintiff, shall be positive—as of one who speaks from actual knowledge, and not merely from information and belief. This is clearly indicated by the fact, that the legislature has provided that section 2313 of the Code does not apply to cases in which executors, administrators, trustees and guardians, are defendants.—Code, § 2315. “The obvious reason of this exception is, that executors, administrators, trustees and guardians are not presumed to be personally cognizant of the facts, and would, as a general rule, be unable to deny the statement of the plaintiff, in the manner required by section 2313. When the plaintiff proposes to testify positively to all the facts necessary to establish his demand, the denial of these facts by the defendant, “upon the best of his knowledge and belief,” will not have the effect of excluding the plaintiff’s statement.—See *Pickle v. Ezell*, 27 Ala. 623. The affidavit of the defendant, taken all together, seems to justify the conclusion, that he intended to place his denial of the correctness of the plaintiff’s statement upon the ground that, according to the best of his knowledge and belief, the services rendered were injurious, rather than beneficial. At all events, it was not an unambiguous and positive denial of the truth of the facts proposed to be sworn to by the plaintiff, and nothing less than this is a compliance with the statute.

[2.] We think the objection to the charges is hypercritical. The court evidently meant, and so no doubt the jury understood the charge, that the physician must have

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used reasonable skill and diligence in his treatment of the slaves. If the charge was calculated to mislead, the defendant should have asked for the proper explanation.

Judgment affirmed.

DOUGLASS vs. EASON.

[ACTION ON PROMISSORY NOTE, BY TRANSFERREE AGAINST MAKER.]

1. *Burden of proof; failure of consideration of note.*—In an action on an unconditional promissory note, given for professional services to be rendered by the payee as an attorney-at-law, and payable on a day certain, the *onus* is not on the plaintiff to prove performance of the stipulated services, but on the defendant to show a failure of performance; and proof of the fact that the attorney was absent at the first ensuing term of the court in which the cause was pending, and that the cause was compromised by the parties before the next term, without more, does not even tend to establish a failure of consideration.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by James R. Eason, as the transferee of White & Bradford, against Robert Douglass; and was founded on the defendant's promissory note, of which the following is a copy:

"\$100. Twelve months after date, I promise to pay White & Bradford one hundred dollars—fee in case of W. P. Shelley & Co. against me, in circuit court of Talladega; and they agree to attend to the case once in the supreme court, if it should go there, without further charge. May 9, 1856.

ROBERT DOUGLASS."

On the trial, as the bill of exceptions shows, after the plaintiff had read his note in evidence, "the defendant offered evidence tending to show, that Alex. White, one of the payees of the note, who was a lawyer of great experience, failed to attend to the cause therein specified, in the circuit court of Talladega; that he did not attend the fall term of said court, 1859, at all; that the cause was arbitrated by the parties between that court and the next, and the award made the judgment of the court at its spring term, 1857; and that said White was not present at that court. The evidence further tended to show, that said White spoke of having a consultation with the other counsel employed in the case before W. & B. were employed; but he never did have it, and never did anything in the cause, within the knowledge of the witness. On this state of facts, the court charged the jury, that if the cause was not reached at the fall term, 1856, and was compromised between that and the next spring court, the defendant was not injured by White's absence, and the plaintiff would be entitled to recover the amount of the note, with interest; to which charge the defendant excepted," and he now assigns the same as error.

L. E. PARSONS, for appellant.

JAS. B. MARTIN, *contra*.

A. J. WALKER, C. J.—When the law casts upon a party the burden of proving a fact, it is to be regarded for the purpose of the trial that the fact does not exist, when there is no evidence conducing to prove it. The plaintiff in this case, by the introduction of the note, established a *prima-facie* right of recovery. If the defendant sought to assail that *prima-facie* case, upon the ground that one of the payees was absent when his presence and services were needed, and his absence was injurious to the defendant's interest in his cause, it devolved upon the defendant to show those facts. From proof of the absence of one of the payees of the note at a term when the defendant's cause was not reached, we cannot infer that there was a tendency of evidence to establish that the presence of

such payee was needful when he was away, or that any injury resulted from his absence. From such premises it would be more reasonable to infer, that his presence was not needed, and his absence not injurious. There being no tendency of evidence to establish the fact which the law required the defendant to prove, there was no error in the instruction by the court to the jury, that the fact did not exist. The promise of the defendant, as set forth in his note, was unconditional; and it did not devolve upon the plaintiff to show a compliance on the part of the payees with their contract. If they were guilty of any breach of the stipulations which were the consideration for the defendant's promise, it was incumbent upon the defendant to prove it.

Judgment affirmed.

BROUGHTON'S ADM'R vs. BRADLEY.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *What law governs validity of contract.*—Where an administrator, on final settlement of his accounts, was sought to be charged with the unpaid balance due on a bond, executed by him to the intestate in his life-time; which bond, though executed in Alabama, and binding the obligor to the payment of eight per cent. interest, was proved to have been given as a substitute for another bond, containing similar terms, but executed in South Carolina, and given for the purchase-money of property there bought by the obligor from the intestate,—*held*, that the validity of the contract, as to the interest reserved, was to be determined by the laws of South Carolina.

APPEAL from the Probate Court of Lowndes.

IN the matter of the estate of Edward Broughton, deceased, on final settlement of the accounts and vouchers of Lawrence B. Bradley, as administrator, at the instance

of R. M. Williamson, as administrator *de bonis non*. It appears from the bill of exceptions, that Williamson sought to charge Bradley with the unpaid balance due on a bond, or writing obligatory, in the following words :

“Lowndes county, Alabama, January 13, 1851.

“I, L. B. Bradley, of the State and county aforesaid, do acknowledge myself to be indebted to Edward Broughton, of Sumter district, South Carolina, in the sum of three thousand dollars, good and lawful money of the State of South Carolina, and do hereby promise to pay the said sum of three thousand dollars, to the said Edward Broughton, his executors, administrators, or assigns, at the times, and in the manner following—to-wit, one thousand dollars on the 1st January, 1854; one thousand dollars on the 1st January, 1857; and the last one thousand dollars on the 1st January, 1860; with interest at the rate of eight per cent. on the whole sum, payable annually, from the date of this note, and until the same is fully paid and satisfied. Witness my hand and seal the day and year above written.

L. B. BRADLEY, [seal.]”

It was proved, as the bill of exceptions shows, that this bond was given as a substitute for another; that the original bond, which was without date, contained the same stipulations as the one above copied, and was executed in South Carolina, for the purchase-money of three slaves; that the contract for the purchase of the slaves was made in South Carolina, the bond signed there, and the property delivered there. The defendant insisted, that this bond was usurious by the laws of South Carolina; and read in evidence the statutes of South Carolina, (as found in the Statutes at large of South Carolina, vol. 4, p. 363; *ib.* vol. 6, p. 109,) establishing seven per cent. as the legal rate of interest, and declaring all contracts, by which a greater rate of interest was reserved, to be void as to the entire interest. The probate court ruled, that the bond was to be governed by the laws of South Carolina, and

was therefore usurious; to which decision the administrator excepted, and which is now assigned as error.

CLEMENTS & WILLIAMSON, for appellant.

S. S. Cox, *contra*.

STONE, J.—The contract by which Edward Broughton sold, and Mr. Bradley bought, the three slaves, Nancy, Puss and Isham, was entered upon and consummated in the State of South Carolina. Until the substituted bond was executed, near four years afterwards, neither the writings nor the proof furnish the slightest intimation that the contract was to be performed anywhere else than at the place where it was entered into. The second, or substituted bond, was not the execution or making of a contract, but can only be regarded in the light of evidence of the contract. Under these circumstances, the law draws the presumption, that the contract was to be performed at the place where it was entered into, and its binding efficacy must be determined by the laws of that place.—Wright v. Burt, 5 Ala. 29; Moore v. Davidson, 18 Ala. 209; Evans v. Kittrell, 33 Ala. 449; Hanrick v. Andrews, 9 Porter, 9, 24, 25; Pearson v. Bailey, 23 Ala. 537; Jackson v. Jones, 13 Ala. 121; DeWolf v. Johnson, 10 Wheat. 367–383. There is nothing in this case to take it out of the operation of the rule above declared. The result is, that the contract was usurious, and the decree of the probate court is affirmed.

FRAZIER'S EXECUTORS *vs.* PRAYTOR.

[ACTION AGAINST EXECUTORS ON PROBATE DECREE AGAINST TESTATOR.]

1. *Requisites of decree.*—The failure of the probate judge to sign the minutes of the term, does not invalidate a decree, nor render it inadmissible as evidence under the plea of *nul tiel record*.

2. *Presentation of claim against decedent's estate.*—In an action against executors, on a decree rendered against their testator in his lifetime, (the statute of non-claim being pleaded,) a witness for plaintiff testified, that the defendants were informed of the nature and amount of the demand, and frequently admitted, within eighteen months after the grant of letters testamentary, "that the plaintiff was claiming said decree of said estate, but said they expected to be able to prove it had been paid"; and that on a partial settlement with the probate court, made within eighteen months after the grant of their letters, they reserved money to pay said decree, provided they should be compelled to pay it,—*held*, that this evidence, if believed by the jury, might justify them in finding that the claim was duly presented to the executors.
3. *Charge invading province of jury.*—The sufficiency of oral evidence to establish the due presentation of a claim against a decedent's estate, is a matter for the determination of the jury; and a charge which instructs them that the evidence, if believed by them, "is not sufficient to authorize them to find a due presentation of the claim," is an invasion of their province.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. WM. S. MUDD.

THIS action was brought by John A. Praytor, against the executors of Richardson Frazier, deceased, to recover the amount of a decree of the probate court of said county, rendered on the 19th March, 1850, which was in the following words: "This day came Richardson Frazier, guardian of John A. Praytor, and made a final settlement of his accounts as such guardian, which is ordered to be recorded. By the final settlement of Richardson Frazier, guardian of John A. Praytor, there appears to be in the hands of said guardian the sum of two hundred and three dollars and twenty-three cents. It is therefore considered by the court, that the said John A. Praytor have and recover against the said Richardson Frazier, guardian as aforesaid, the said sum of two hundred and three dollars and twenty-three cents, for which let an execution issue." The defendants pleaded *nul tiel record*, and the statute of non-claim; and issue was joined on each of these pleas. On the trial, as the bill of exceptions shows, when the plaintiff offered the probate decree in evidence, the defendants objected to its admission, "because neither

said decree, nor the minutes of the term at which it was rendered, were signed by the judge of said court." The court overruled the objection, and adjudged the issue on the plea of *nul tiel record* in favor of the plaintiff; to which the defendants excepted.

"The plaintiff then introduced Moses Kelly as a witness, who was the probate judge of the county, who testified that, within eighteen months after the grant of letters testamentary to the defendants, he received a letter from the plaintiff", which he produced, and which asked information as to the condition of plaintiff's estate in the hands of his guardian—whether the guardian had ever made a settlement with the probate court, &c. "Said Kelly testified, that he told one or both of the defendants, within eighteen months after the grant of their letters, that said decree was upon record in his office, and that plaintiff was claiming it of their testator's estate, and, at the same time, read said decree to one or both of them; that his son G. P. Kelly, who was a clerk in his office, and who was not examined as a witness, though he was present in court, received letters from plaintiff, within said eighteen months, relative to said decree, and also a power of attorney to collect said decree from the defendants; that he (witness) had frequent conversations with the defendants, within said eighteen months, relative to said decree; that the defendants admitted, in said conversations, that plaintiff was claiming said decree of said estate, but said they expected to be able to prove it had been paid; and that upon making a final settlement with said probate court, within said eighteen months, the defendants reserved money to pay said decree, provided they should be compelled to pay it. Said conversations all took place after said letter was read and handed over to the defendants. There was no proof that the defendants knew of the existence of said power of attorney. The defendants' letters testamentary were granted on the 31st July, 1857, and they made due and legal publication for the presentation of claims. This being all the evidence on the question of presentation, the court charged the jury, (among other things,) that if they believed the evi-

dence of Judge Kelly, they might look to all the facts testified to by him, as circumstances from which they might infer that said decree had been presented to the defendants as executors, as a claim against their testator's estate, within eighteen months from the grant of letters testamentary to them. The defendants excepted to this charge, and requested the court to instruct the jury, that the testimony of said Kelly, if believed by them, was not sufficient to authorize them to find that said decree had been presented to them, as a claim against their testator's estate, within eighteen months after the grant of letters testamentary to them, as required by the statute of non-claim. The court refused to give this charge, and the defendants excepted."

The several rulings of the court to which exceptions were reserved, as above stated, are now assigned as error.

WM. S. EARNEST, with E. W. PECK, for appellant.

PORTER & MARTIN, *contra*.

R. W. WALKER, J.—The failure of the judge to sign the minutes, did not invalidate the decree, nor render it inadmissible in evidence.—*Bartlett & Waring v. Lang's Adm'rs*, 2 Ala. 161.

The charge excepted to was not an instruction that the evidence of Kelly, if believed by the jury, amounted to proof of a presentation of the claim within eighteen months. It left the weight of the evidence, in determining the question of presentation, to the jury; but instructed them, that there was no rule of law which prohibited them from finding, upon the evidence referred to, that the claim had been duly presented to the executors within eighteen months from the grant of letters testamentary. The evidence of Kelly showed, that the executors were informed of the nature and amount of the demand: that they frequently admitted, within the eighteen months, that "the plaintiff was claiming of said estate said decree, but said they expected to be able to prove it had been paid;" and upon a partial settlement made by them within the eighteen months, they reserved money

to pay this decree, provided they should be compelled to pay it. We cannot say that, upon such evidence, a jury would not be justified in finding a due presentation of the claim to the executors within eighteen months from the grant of letters testamentary.—See *Pollard v. Secars*, 28 Ala. 487; *Harrison v. Jones*, 33 *ib.* 258; *Pharis v. Leachman*, 20 *ib.* 662; *Hallett v. Br. Bank*, 12 *ib.* 192. Consequently, there was no error in the charge.

[3.] The charge asked by the defendant, was rightly refused. The sufficiency of the evidence to establish the presentation, was a matter which the court properly left to the jury; and the charge, if given, would have been an invasion of their province.

Judgment affirmed.

GRIFFIN vs. CAMACK.

[BILL IN EQUITY TO ENFORCE VENDOR'S LIEN FOR PURCHASE-MONEY OF LAND.]

1. *Equitable assignment of vendor's lien*.—An unqualified endorsement of a promissory note, given for the purchase-money of land, is an equitable assignment of the vendor's lien; and an unqualified assignment of a judgment, recovered by the endorsee upon the note, carries with it the same lien.
2. *Assignment of judgment*.—An assignment of a judgment, in these words, "For value received, I hereby transfer the entire control of the *fi. fa.* from the above stated judgment," and of the judgment above stated, from this date, to A. B. G.,—is an unqualified transfer of the judgment.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Furney Camack, against George Cook, Andrew B. Griffin, and John W. Hale; and sought to enforce a vendor's lien for the unpaid purchase-money of land. The land was sold by

Camack to Cook on the 15th July, 1854, for \$800; and Cook executed and delivered his three promissory notes for the purchase-money, payable on the 25th December, 1854, 1855, and 1856, respectively. The first of these notes was transferred by Camack, on the 24th January, 1855, to Thomas T. Storey, who obtained a judgment thereon against Cook, on the 4th April, 1855. The bill alleged, that Griffin claimed to be the owner of this judgment, and had received the possession of the land from Cook; and that Hale was in possession as the tenant of Griffin. A decree *pro confesso*, on publication, was entered against Cook. Griffin answered, setting up his purchase from Storey of the judgment on the first note, and insisting that his lien was superior to the complainant's. On final hearing, on pleadings and proof, the chancellor held, that the assignment under which Griffin claimed the judgment, and which is copied in the opinion of the court, did not operate as an assignment, *pro tanto*, of the vendor's lien. He therefore rendered a decree for the complainant; and his decree is now assigned as error by the defendant Griffin.

JNO. M. PHILIPS, for the appellant, cited *Cullum v. Erwin*, 4 Ala. 452; *Bank of Mobile v. P. & M. Bank*, 9 *ib.* 645; *White v. Stover*, 10 *ib.* 441; *Kelly v. Payne*, 18 *ib.* 371; *Conner v. Banks*, 18 *ib.* 42; *Center v. P. & M. Bank*, 22 *ib.* 743; *Griggsby v. Hair*, 25 *ib.* 327.

WATTS, JUDGE & JACKSON, *contra*.

A. J. WALKER, C. J.—We think the law is settled in this State, that the unqualified transfer of a note, given for the purchase-money of land, or of a judgment upon the note, is a transfer of the vendor's lien on the land for the payment of the note.—*White v. Stover*, 10 Ala. 441; *Kelly v. Payne*, 18 Ala. 371. An endorsement by the complainant of one of the notes given by his vendee transferred the lien of the note, and a transfer of the judgment recovered by the endorsee upon the note would carry with it the same lien.

[2.] The language of the transfer of the judgment is as follows: "For value received, I hereby transfer the entire control of the *fi. fa.* from the above stated judgment, and of the judgment above stated, from this date, to A. B. Griffin." We construe this language as making an unqualified transfer of the judgment. The giving of the "*entire*" control of a judgment to another, for a valuable consideration, has precisely the effect of a sale of the judgment. We do not deny that an endorsement may be so qualified as not to carry with it the lien of the debt endorsed; but we think there is no such qualification in the transfer of the judgment to the defendant Griffin.

The evidence of the witness Baker conduces to show, that the judgment was really paid off at the date of the transfer; but we think the witness Baker is mistaken, and that his mistake is shown by the testimony of the witnesses Storey and A. B. Griffin, jr. The testimony of Baker tends to prove, that the note given on the occasion of the transfer of the judgment was really the note of Cook, the defendant in the judgment; and that the appellant, Griffin, merely signed it as the surety of Cook. If this were so, it might, perhaps, be inferred that the judgment was really discharged, and that the transfer of the judgment was merely an attempt to keep it open for the indemnity of the surety. But we are precluded from taking this view of the subject, because the other two witnesses, above named, show that the note was signed by Griffin alone.

The decree in this case must be, that the land be sold; that the costs be paid out of the proceeds of the sale, and that the balance be appropriated to the payment of the debts of the complainant and defendant Griffin; and if the fund is insufficient for the payment of the entire debts, that it be distributed to them *pro rata*.

Decree reversed, and cause remanded.

RUDOLPH vs. WAGNER.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Waiver of objection to plea of tender.*—If issue is joined on a plea of tender, without objection to its sufficiency, the plaintiff can not be heard to insist that the plea was not filed in time, or that it was not accompanied by a payment of the money into court at the first term.
2. *Sufficiency of tender.*—If the complaint claims interest only from the 1st January, although the debt was due before that day, the plaintiff can not be heard to insist that a tender of the principal, between the day on which the debt matured and the 1st January, was not sufficient, because it did not include the interest which had then accrued.
3. *Same.*—A tender of the entire amount due, including interest, at any time between the maturity of the debt and the commencement of suit, stops the interest, and discharges the debtor from the costs of suit.
4. *Same.*—As a general rule, an actual production and proffer of the money is essential to constitute a valid tender; but, if the debtor is ready and willing to pay, and is only prevented from producing the money by the creditor's declaration that he will not receive it, this dispenses with an actual production of the money.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by F. H. Wagner, against John B. Rudolph, to recover the sum of \$210, alleged to be "due from the defendant to the plaintiff for four hundred and twenty bushels of corn, which plaintiff sold and delivered to defendant, at fifty cents per bushel, in the month of December, 1856, together with interest thereon from the 1st January, 1857." "When the cause was called for trial," as the bill of exceptions states, "the defendant put in a plea of the general issue; and the parties consented that a regular plea of the tender of \$133 25 before suit brought should be considered as then filed; and the defendant, at the same time, paid that sum of money to the clerk, in open court. The plaintiff made no objection

to the plea being filed at the trial, but insisted that the money should have been paid into court at the first term. Issue was joined on both of these pleas."

The only evidence offered by the plaintiff consisted of the defendant's answers to interrogatories propounded to him under the statute; which, after stating that, about the 16th December, 1856, he received from plaintiff "two hundred and sixty-five bushels, two pecks and one quart of corn," at the stipulated price of fifty cents per bushel, continued as follows: "I owed the plaintiff, for said corn, the sum of \$132 77; and about christmas, 1856, through a friend who acted as my agent, I tendered to plaintiff the amount which I owed him for said corn, estimating the quantity and price as aforesaid. He refused to accept said tender, and I hold the amount aforesaid for him, which I am ready and willing to pay. Upon these facts, I am advised, and therefore answer, that I owe the plaintiff nothing for said corn, and owed him nothing at the commencement of this suit, but that I hold said money for him." The defendant then introduced a witness who testified, "that some time between the middle and last of December, 1856, as agent of the defendant, and having in his pocket more than \$150 of defendant's money in gold, with a similar sum in paper, he went to the plaintiff for the purpose of tendering the amount due for the corn mentioned in defendant's said answers; that he had previously made a calculation of what defendant owed plaintiff for said corn, estimating the quantity at between two hundred and sixty and two hundred and seventy bushels; that he did not remember the precise amount of the debt according to his estimate, but his best recollection was that the amount was between \$134 and \$135, although his memory on the point was indistinct; that he included no interest in his estimate of the amount due; that at the time above mentioned, as defendant's agent, he offered plaintiff the amount of the debt according to his said estimate; that he had the money in his pocket at the time, and told plaintiff so, and was ready and willing to produce it; that the plaintiff refused to receive it, and, in consequence thereof, he

did not actually produce and show the money to plaintiff."

"This being all the evidence in the cause, the court charged the jury, that if they believed all the evidence, they should find the issue on the plea of tender for the plaintiff; also, that if they believed the evidence contained in the defendant's answers to the interrogatories, the plaintiff was entitled to recover the amount of the corn sold and delivered, at the price agreed on, with interest from the time of delivery.

"The defendant excepted to each of these charges, and then requested the court, in writing, to instruct the jury, 'that in order to constitute a good tender, it is not necessary that the money should be actually produced, if the party making the tender is ready and willing to pay the same, and is about to produce it, but is prevented by the creditor declaring that he will not receive it.' The court refused this charge, and the defendant excepted."

The charges given, and the refusal of the charge asked, are now assigned as error.

BAINES & NESMITH, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

R. W. WALKER, J.—1. If the plaintiff desired to question the sufficiency of the plea of tender, either because the plea itself was not filed in time, or because the money was not paid into court at the first term, he should have objected to the *plea*, and had his objection passed upon by the court. He did not do this, but joined issue on the plea; and the cause was regularly tried on that plea, with the general issue. We must, therefore, consider that a regular plea of tender was duly filed, accompanied by a delivery of the money to the clerk of the court, as required by section 2245 of the Code. Besides, it appears that the plea, accompanied by a delivery of the money to the clerk, was filed before any default had been entered by the plaintiff: and if the latter had objected to it, on the ground that the money was not paid into court at the first term, we do not perceive that there would

have been any force in the objection.—Woolsey v. M. & C. R. R. Co., 28 Ala. 539-540.

2. We think that the court erred in both of the charges it gave to the jury. The answers of the defendant, which furnished the only evidence offered by the plaintiff of his demand, show that, "about the 16th December, 1856," the defendant purchased and received corn of the plaintiff, amounting, at the price agreed on, to \$132 77; and that "about Christmas, 1856, through a friend who acted as his agent, he tendered to the plaintiff *the amount which he owed him*, estimating the quantity and price as aforesaid." The first objection which is made to the proof of a tender, is, that it shows only a tender of the principal amount for which the corn was sold, \$132 77; the interest on the same from the time of sale to the time of the tender not being included. The plaintiff does not, in his complaint, claim interest on the account, except from 1st January, 1857. Can he now insist, that a tender of the principal, at a date prior to the 1st January, 1857, was not a tender of all that was then due? We do not think that he can. Although the debt may have been due on the 16th December, it was competent for the parties to contract that interest should not be demandable, if the debt should be paid at any time before the 1st January; and according to the allegations of the complaint, that was the character of the contract which the parties made.

Moreover, the bill of exceptions shows, that the only other evidence introduced on the trial was the testimony of a witness for the defendant, who stated that, "some time between the middle and last of December, 1856," he tendered to the plaintiff the amount which he (the witness) estimated the defendant owed the plaintiff; and that, to his best recollection, the amount was \$134 or \$135. Now, if the principal sum due on the 16th December, 1856, was \$132 77; and at any time between the middle and last of the same month, the defendant, by his agent, tendered the plaintiff \$134 or \$135, it is plain that the amount thus tendered was sufficient to cover the entire debt, both principal and interest. It is true, the witness asserts that, in his estimate of the amount of the

debt, he included no interest. But his estimate may not have corresponded exactly with the estimate which was made by the defendant himself; and if, in point of fact, the witness, as the agent of the defendant, tendered enough money to cover *the actual debt and interest*, the tender was good. That there was some evidence before the jury that he did so, cannot be doubted. As there was some evidence tending to show that the defendant had tendered a sum sufficient to cover both principal and interest, it is plain that (even if on the pleadings the plaintiff could insist that his demand bore interest prior to 1st January, 1857,) the court erred in the charge given, unless, indeed, the second objection which is made to the tender proved is well founded.—*City Council v. Gilmer*, 33 Ala. 116, 134; *Peebles v. Tomlinson*, 33 Ala. 337.

3. This second objection is, that the tender was not made on the day the debt was due, but afterwards. Whatever may be the rule in reference to contracts for the delivery of specific chattels on a given day, we think, that where there is a mere dry promise for the payment of money, and the liability of the defendant is restricted to the principal sum and interest, a tender of the whole amount due, principal and interest, at any time after the debt falls due, but before suit is brought, stops the interest, and discharges the party from the costs of a subsequent suit. Whether it absolutely bars the action, we need not inquire.—See *Johnson v. Clay*, 7 Taunton, 486; *Sweatland v. Squire*, 2 Salk. 623; 3 Blackst. Com. (Sharswood's ed.) note, p. 304; *Hall v. Peters*, 7 Barb. 331, 334; *Haughton v. Leary*, 3 Dev. & Batt. 21; 2 Parsons Contr. 152-3; *Tracy v. Strong*, 2 Conn. 659; *Day v. Lafferty*, 4 Pike, 450; 2 Greenl. Ev. § 607; *Raiford v. Governor*, 29 Ala. 382; *Smith v. Anders*, 21 Ala. 782.

4. The general rule is, that it is essential to a valid tender that the money be actually produced and proffered to the creditor. But it is well settled, that the production of the money is dispensed with, if the party is ready and willing to pay the same, and is about to produce it, but is prevented by the creditor's declaring that he will not receive it; and the court should so have instructed the jury.

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2 Greenl. Ev. § 603; Hazard v. Loring, 10 Cushing, 267; Sands v. Lyon, 18 Conn. 18; Appleton v. Donaldson, 3 Barr, 381; 3 Blackst. Comm. note, p. 304.

Judgment reversed, and cause remanded.

ALABAMA AND MISSISSIPPI RIVERS RAIL-ROAD CO. *vs.* SANFORD & REID.

[ACTION AGAINST RAILROAD COMPANY, BY ASSIGNEE OF ENGINEER'S CERTIFICATE FOR WORK DONE BY CONTRACTOR.]

1. *Proof of execution of written instrument on which suit is founded.*—In an action against a railroad company, on a certificate issued by its engineer for work done by a contractor, (which certificate is alleged to have been signed and issued by the engineer as the authorized agent of the corporation, and to have been transferred by the contractor to plaintiff;) there being no sworn plea, denying the execution of the certificate,—the instrument itself is evidence of the existence of the debt, (Code, §§ 2238, 2278-79,) and that it was made on sufficient consideration.
2. *Admission of superfluous evidence.*—The admission of evidence to prove a fact which is admitted by the pleadings, is, at most, error without injury.
3. *Who is proper party plaintiff; averment and proof of ownership of demand.*—A certificate, issued and signed by the chief engineer of a railroad company, in these words: "This is to certify, that the sum of \$1000 is due to A. B. from the Ala. & Miss. Rivers Railroad Company, for bridging and track-laying",—is a contract for the payment of money, within the meaning of the statute (Code, § 2129) requiring an action to be brought in the name of the party really interested; an averment, that the payee assigned the said certificate, by endorsement, to the plaintiff, is a sufficient allegation of the latter's ownership and interest; and in the absence of a sworn plea, denying the assignment, proof thereof is not required of the plaintiff.
4. *Sufficiency of consideration; admissibility of parol evidence to corroborate.*—In an action against a railroad company, by the assignee of a certificate issued by its engineer to a contractor for work done on the road, proof of an oral agreement between the contractor and

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the engineer, to the effect that the certificate should be used in paying a debt due from the contractor to a stockholder, who was indebted to the railroad company, is not admissible for the defendant. If such agreement was made after the issue and delivery of the certificate, it is without consideration; if made before the issue and delivery of the certificate, and as an inducement to its issue, its effect is to vary the terms of the certificate.

5. *Presumption as to settlement of accounts on execution of note; admissibility of evidence to prove payment or set-off.*—On settlement of accounts between a debtor and his creditor, a note being given for the ascertained balance, an order, previously given by the creditor to a third person, if then accepted or paid, is presumed to have entered into the settlement; but, if the order was accepted and paid after the settlement, proof of such acceptance and payment is necessary to render it admissible evidence under the plea of payment or set-off.
6. *Competency of stockholder as witness for private corporation.*—A stockholder in a railroad company is not a competent witness for the corporation.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the appellees, as the assignees of Leach & Donoho, and was founded on a written instrument, of which the following is a copy:

“CERTIFICATE No. 204.

Engineer's Office, Ala. & Miss. Rivers R. R. Co., }
Selma, May 18th, 1855. }

\$1108 21. This is to certify, that the sum of eleven hundred and eight 21-100 dollars is due to Leach & Donoho, from the Alabama and Mississippi Rivers Railroad Company, for bridging and track-laying.

LEWIS TROOST, Engineer.

To James L. Price, president.

Attest: Jas. L. Price, president.”

The second count in the complaint was as follows: “The plaintiff's claim of the defendant, also, eleven hundred and eight 21-100 dollars, due on a certificate in the following words”, &c., (setting out the certificate above copied;) “and plaintiff's aver, that said Lewis Troost was the engineer of said road, appointed by said defendant,

and had the full power and authority as such, by virtue of the charter of said company, and of the laws, ordinances and resolutions of the board of directors thereof, to issue said certificate, and to direct it to the president of said railroad company for his attestation; and that said certificate was so directed, and received the attestation of the president of said company, and, when so attested, by virtue of the said charter, laws, ordinances and resolutions of said company, became and was obligatory on said defendant to pay the same, and the defendant thereby became liable to pay the same, according to the tenor and effect thereof; that afterwards, and before said certificate was paid, said Leach & Donoho, by their written endorsement on said certificate, assigned the same to plaintiff, and requested said defendant to pay to plaintiff the said sum of money therein specified, with the interest due thereon; of all which said defendant had due notice, and, by reason thereof, became liable to pay to plaintiff the said sum of money mentioned in said certificate, and being so liable, afterwards," &c., promised to pay, &c. A demurrer was interposed to this count, but the record does not show what disposition was made of it; nor does it show what pleas were filed.

On the trial, as the bill of exceptions shows, the plaintiffs read in evidence the defendant's charter, (Session Acts 1849-50, p. 159,) with the act amendatory thereof, (Session Acts 1851-2, p. 216,) and then offered in evidence the certificate above copied. "The defendant objected to the admission of said certificate, because there was no proof of its execution; and because there was no proof of any authority from defendant to said Troost to make said certificate, or to said Price to approve it; or that said Troost was the engineer, or said Price the president of said railroad company at that date; or that said Troost and Price had any authority, the one as engineer, and the other as president, to bind the defendant by any such certificate." The plaintiffs then introduced a witness who proved the signatures of Troost and Price, and further testified, that Troost acted as the defendant's engineer during the year 1855, and issued similar certificates for

work done on the road ; and that one of these certificates, within his knowledge, was paid by the defendant. The court overruled the several objections to the certificate, and the defendant excepted ; and exceptions were also reserved by the defendant to the admission of the evidence by which Troost's agency was sought to be established.

The defendant then read in evidence, after proof of its execution, an order drawn by Leach & Donoho, dated the 11th April, 1855, and directed to "D. A. Boyd, treasurer of the Alabama and Mississippi Rivers Railroad Co.", in these words: "On the 1st June next, please pay to the order of P. J. Weaver eight hundred and seventy-five 04-100 dollars, which amount you are requested to retain out of our first estimates after date, or before if final settlement should be made with us, for value received, with interest from date." The defendant then read in evidence the deposition of one Fox, who was an assistant engineer of said railroad company, from October, 1854, to August, 1855, and who testified, substantially, as follows: that he was present in the office of said railroad company in Selma, in April, 1855, when Leach & Donoho were making a settlement with the chief engineer and treasurer of said railroad company, for work done by them as contractors ; that the parties failed to effect a full settlement, because Leach & Donoho claimed a larger sum than the engineer and treasurer admitted to be due to them ; that the former then asked the issue of three certificates, for an aggregate amount not exceeding what was admitted to be due to them, "to enable them to settle claims outstanding against them" ; that one of those claims was in favor of P. J. Weaver, who was indebted to the railroad company for unpaid stock, and to whom Leach & Donoho were indebted ; that it was agreed between the parties, before the certificates were issued, that one of said certificates, "for about eleven hundred dollars, was to be used by Leach & Donoho to liquidate said Weaver's claim against them, and could be used by said Weaver as part payment of his stock" ; that said certificate was issued in pursuance of this arrangement, and was delivered to Leach & Donoho, and that Weaver was

not present at the time. The defendant then introduced as witnesses D. A. Boyd, the treasurer of said railroad company, and one N. Waller, each of whom was a stockholder in said railroad company. The plaintiffs having objected to the competency of said witnesses on the ground of interest, "the defendant's counsel stated to the court, that he expected to prove that said Boyd, as treasurer of said railroad company, had accepted said order of Leach & Donoho; that said certificate, or the money due upon it, belonged to said Weaver; that the defendant admitted its liability to pay said certificate, or the money due on it, either to plaintiff, or to said Weaver, but not to both; and therefore insisted that the defendant's interest was balanced." The court sustained the objection to the competency of the witnesses, and the defendant excepted. The defendant offered no other evidence, and the court then excluded from the jury, on the plaintiffs' motion, the order of Leach & Donoho, and the testimony of Fox, above mentioned; to which the defendant excepted.

"This being all the evidence, the court charged the jury, at the request of the plaintiffs, that if they believed the evidence, they should find for the plaintiffs; to which charge the defendant excepted."

The several rulings of the court on the evidence, and the charge to the jury, are now assigned as error.

ALEX. & JNO. WHITE, for appellant.

BYRD & MORGAN, *contra*.

STONE, J.—Although there is a demurrer found in this record, yet we do not find that any disposition was made of it in the court below. Hence, we will not pass upon the sufficiency of the several counts, further than to say, we find no defect in the second special count—the one under which this trial was probably had—when that count is construed under the liberal rules of pleading provided by the Code. The second special count is based on the written contract, or certificate of the engineer of the railroad. The count avers the authority of the engineer to issue such certificate, that he did issue it, its attestation

by the president of the company, and that the company thereby became bound for its payment. This, then, is a written contract, the foundation of the suit, purporting to be signed by the agent of the party sought to be charged; and there being no sworn plea, denying the execution of such instrument, the same was, *per se*, evidence of the existence of the debt sued for, and that it was made on sufficient consideration.—Code, §§ 2238, 2278, 2279; May v. Hewitt, 33 Ala. 162; Ala. Coal Mining Co. v. Brainard, 35 Ala. 476.

[2.] The principle above asserted renders it unnecessary that we should inquire as to the legality or sufficiency of the testimony which was offered to show the official relations which Messrs. Frost and Price sustained to the defendant corporation. Those relations were admitted by the pleadings; and whether the evidence was legal or illegal, it could have worked no injury.—Shep. Dig. 568, §§ 90, 91.

[3.] The claim sued on in this case is a contract for the payment of money, which must be prosecuted in the name of the party really interested.—Code, § 2129. The complaint sufficiently shows, that the present plaintiffs had the right to maintain this suit; and in the present state of the pleadings, it was not necessary they should prove their interest.—Code, § 2279; Smith v. Harrison, 33 Ala. 706; Rule of Practice, 31 Ala. p. v.

It is thus shown that, when the plaintiffs read in evidence the certificate declared on, they made out a *prima-facie* case.

[4.] The testimony of the witnesses Fox and others, offered with a view of showing an outside oral agreement that this certificate was intended to be employed in payment of a debt due from Leach & Donoho to their creditor, Weaver, was, by itself, wholly immaterial, and was rightly excluded by the circuit court, for the following (if for no other) reasons: If Leach & Donoho, after receiving the certificate, or independently of any inducement to the issue of the certificate, promised to turn that certificate over to Weaver, their creditor, (the latter being a debtor to the railroad,) this was a mere naked promise, or

nude pact, which they, Leach & Donoho, could disregard without liability to any person.—McKenzie v. Hunt, 32 Ala. 494. If the agreement was made before the issue of the certificate, and entered into the inducement to its issue, then the agreement was inoperative, because its direct effect would have been to vary, by oral proof, the terms of a written agreement.—Thomason v. Dill, 30 Ala. 444. On the most favorable view which can be taken of this question, and of the proof offered, its effect could not possibly be to vest in Mr. Weaver a right to the certificate, and the money due thereon, as so much property *sold and delivered to him*. He, therefore, did not become the real owner of the certificate.—McKenzie v. Hunt, *supra*; Mather v. Purcell's Administrator, in manuscript; Thompson v. Rawles, 33 Ala. 29.

[5.] The rejection as evidence, by the circuit court, of the order given by Leach & Donoho to Weaver, was right under the circumstances. That order, without any proof of its payment or acceptance, was offered as a naked fact. It bears date some time before the date of the certificate; and if it had been accepted or paid before the settlement of May 18th, the presumption is it was then taken into the account, and that the railroad obtained a credit for it. At least one note was then given by the railroad to Leach & Donoho, which, unexplained, shows a settlement of open accounts. If accepted and paid afterwards, the railroad should have proved, or offered to prove that fact, so as to have legalized the evidence on a plea of payment or set-off. The testimony being wholly worthless by itself, the court did not err in excluding it, after the defendant had closed his testimony.—Townsend v. Cowles, 31 Ala. 428.

[6.] The court did not err in excluding as witnesses for defendant two of its stockholders. The Alabama and Mississippi Rivers Railroad Company is a private corporation, not eleemosynary in its character, having for one of its objects, at least, the private emolument of its proprietors.—Pamph. Acts 1849-50, 159; Pamph. Acts 1851-2, 216. Although the stockholders are not technically parties to the suit, yet they are the real parties to

the litigation; as much so as would be beneficiaries in a suit by a trustee, or distributees in a suit by an administrator. The rule on this subject must be general. There may be corporations, in which one stockholder owns half, or even the entire stock; and yet, in suits affecting the corporation, the litigation would be conducted in the name of the artificial person. We cannot believe the legislature intended to confer on one or more persons who chance to have an interest, or *the* interest in a private corporation, the privilege of being witnesses in their own causes, when, without such act of incorporation, they could assert no such right.—See *Walker v. Walker*, 34 Ala. 469; *Polly & Whitman v. McCall*, at the present term.

It results from what we have said, that the circuit court did not err in instructing the jury, if they believed the evidence, to find for the plaintiffs. The plaintiffs' testimony being documentary, the court might have gone further.

Judgment affirmed.

BENSON & CO. vs. McCOY.

[ACTION TO RECOVER DAMAGES FOR WRONGFUL AND MALICIOUS ATTACHMENT.]

1. *When action lies for suing out attachment.*—In an action to recover damages for the wrongful and malicious suing out of an attachment, a charge, instructing the jury, "that if the defendants did not sue out the attachment with malice, or from a disposition to vex or harass the plaintiff, but honestly believed that they had reasonable and probable cause to sue out the attachment," then the plaintiff was not entitled to recover, asserts a correct legal proposition.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by John W. McCoy, against J. P. Benson & Co., to recover damages for the wrongful and malicious suing out of an attachment. "On the trial," as the bill of exceptions states, "the plaintiff offered evidence to show, that an attachment was wrongfully sued out against his property by the defendants, and that he had thereby sustained some actual damages; while the defendants offered evidence tending to show, that they had reasonable and probable grounds for suing out said attachment; that it was sued out without malice, or any disposition to vex or harass the plaintiff; that the attachment was levied by garnishment, and that the fund in the hands of the garnishee was condemned to the satisfaction of their debt. The defendants asked the court to charge the jury, that if they believed from the evidence that the defendants did not sue out the attachment with malice, or from a disposition to vex or harass the plaintiff, but honestly believed that they had reasonable and probable cause to sue out the attachment at the time when said attachment was sued out, then the plaintiff is not entitled to recover in this action. The court refused to give this charge, and the defendants excepted;" and they now assign the refusal of said charge as error.

WATTS, JUDGE & JACKSON, for appellants.

D. W. BAINE, *contra*.

R. W. WALKER, J.—The substance of the charge which was asked by the defendants, as we understand it, was, that if the attachment was sued out without malice, or any disposition to vex or harass the plaintiff, and under an honest belief that there was probable cause, the plaintiff was not entitled to recover. Placing this construction upon the charge, it is clear that the court erred in refusing to give it; for, since the Code, an action on the case will not lie for suing out an attachment, unless it is sued out maliciously, and without probable cause, as well as wrongfully.—McKellar v. Couch, 34 Ala. 336, and authorities cited; also, Vandryon v. Linderman, 10 John. 106; De Medina v. Grove, 10 Ad. & Ell. (N. S.) 152, 168; S. C. *id.*

172, 177; Churchill v. Siggers, 3 Ell. & Black. 937; Olinger v. McChesney, 9 Leigh, 660; 2 Greenl. Ev. §§ 449, 453.

We do not think that this charge raises, and therefore we do not consider the question, whether the existence of what is called *malice* may not be consistent with the absence of a disposition to vex or harass, and with an honest belief that there is reasonable and probable cause for suing out the attachment. For, if we suppose that the charge had been given as requested, and that the evidence had satisfied the jury that the attachment was sued out with malice, it is obvious that the basis of the charge would have been at once destroyed; and in that event, it could not have been looked to, (no matter what the other evidence in the case might have been,) as a direction to find for the defendants. If the plaintiff desired a definition of malice to be given to the jury, he could have attained his object by a prayer for additional instructions.

Judgment reversed, and cause remanded.

HARTWELL vs. WHITMAN.

[BILL IN EQUITY BETWEEN CO-SURETIES FOR CONTRIBUTION.]

1. *Weight of answer as evidence.*—Where the bill alleges that an original paper, a copy of which is appended as an exhibit to the bill, is in the defendant's possession, and specially interrogates him as to the correctness of the alleged copy, and requires him to point out the differences (if any) between it and the original; and the defendant specifies in his answer two particulars in which the alleged copy differs from the original, and avers that there are other differences which he cannot recollect,—this does not impose upon the complainant the *onus* of proving the correctness of the alleged copy.
2. *Variance, and substance of proof.*—In a bill between co-sureties for contribution, alleging that the defendant received a certain draft from the principal as an indemnity, and gave a receipt for the same, wherein it was recited and stipulated that the money col-

lected on the draft should be applied to the payment of the judgment against the two sureties,—the date of the receipt, and the description of the judgment, are immaterial matters: consequently, a variance between the allegations and proof, in these particulars, is not fatal to the plaintiff's case.

3. *Right of contribution between co-sureties.*—In the absence of special circumstances rendering the general rule inapplicable, one surety is entitled to share in the benefit of any indemnity which a co-surety may have obtained from their principal, although such indemnity may have been intended for the benefit of the latter surety alone.

APPEAL from the Chancery Court of Lowndes.

Heard before the HON. WADE KEYES.

THE bill in this case was filed, on the 28th February, 1854, by James K. Whitman, against Thomas C. Hartwell, and alleged these facts: That on the 28th March, 1850, said Whitman and Hartwell, as sureties of one W. F. Read, executed a promissory note for \$640, jointly with their principal, payable on the 1st January, 1851, to one Thomas M. Williams; that suit was afterwards brought on this note, against all the makers, and judgment was thereon recovered against them; that Read afterwards placed in Hartwell's hands, as an indemnity against this judgment, a draft for \$1300 on the managers of the *Lowndesboro Female Institute*, the proceeds of which, when collected, were to be applied by Hartwell to the payment of said judgment; that Hartwell gave Read a receipt for this draft, specifying therein the contract under which it was received; that said original receipt, of which an alleged copy was appended to the original bill, was in the defendant's possession; that the complainant was afterwards compelled to pay one-half of said judgment under execution; that the defendant collected the money due on the draft, but refused to appropriate it to the satisfaction of said judgment, or to let the complainant share in it, &c. The defendant answered the bill; admitting his suretyship with the complainant, the rendition of the judgment on the note, his receipt of the draft from Read, and his collection of the money due on said draft; but denying the alleged terms of the contract under which he

received the draft, and the correctness of the alleged copy of the receipt which he gave for it; and alleging that he received the draft as an indemnity against other liabilities as surety for said Read. The material averments of the bill and answer, in reference to these matters, being particularly stated in the opinion of the court, need not be here repeated. On final hearing, on pleadings and proof, the chancellor rendered a decree for the complainant; and his decree is now assigned as error.

BAINE & NESMITH, for appellant.

THOMAS WILLIAMS, *contra*.

A. J. WALKER. C. J.—That the defendant, Hartwell, received a draft from Read, the principal of himself and his co-surety; that this draft was collected by the defendant; that he executed a receipt for the draft; that the receipt went into his possession, and that he fails to produce it in answer to the complainant's call, upon the plea that it is lost or mislaid,—are uncontroverted and indisputable facts in this case. The complainant exhibits with his bill what is alleged to be a copy of the receipt; and it is contended, that the denial of the answer casts upon the complainant the *onus* of proving the correctness of his alleged copy by two witnesses, or by one witness supported by corroborating circumstances. In the answer to the original bill, the defendant simply excuses himself for not admitting the exhibit to be a correct copy of the receipt, on the ground of a want of recollection. A supplemental bill was filed by the complainant, in which it was averred, that the defendant had, after filing his answer to the original bill, come into the possession of the receipt; and the defendant is interrogated as to the correctness of the alleged copy, and called upon to designate the points of variation from the original, if any such exist. The defendant answers, that the alleged copy differs from the original in its date, and in the fact that it contains the name of Whitman; and that there are other differences, which he cannot remember or state.

The assertion of the answer, that there were other dif-

ferences, besides the two specified, which could not be particularized, does not require the measure of counter-vailling evidence claimed by the defendant. To impose that burden upon the complainant, it is requisite that the denial should not be evasive, but should be clear, unequivocal, and positive.—3 Greenl. on Ev. 287; Savage v. Benham, 17 Ala. 119; Farman v. Brooks, 9 Pick. 213-250; Amos v. Heatherly, 7 Dana, 45. The rules of chancery practice, as well as the interrogatories propounded, required the defendant to do more than to make a literal denial of the correctness of the exhibit: they required him to go on and specify the inaccuracies.—Russey v. Walker, 33 Ala. 532; White v. Wiggins, *ib.* 424. If he fails to do so on account of a deficiency of memory, the higher measure of proof is not required. His memory does not enable him to controvert the correctness of the several parts of the instrument; and his answer is not *clear, unequivocal, and positive*, but is uncertain, doubtful, and indefinite, in its failure to specify what parts are incorrect.

If the complainant were required to prove the correctness of every part by two witnesses, that exaction would necessarily be made as to portions of it not denied; for the denial does not cover every part of it. The burde of showing the correctness of the exhibit by two witnesses, or by one with a corroboration, is not by the answer cast upon the complainant, as to any part of the instrument save the two particulars specified. One of these particulars is the date of the receipt, which is altogether immaterial; for it is apparent that the instrument was executed at such a time as comports with the equity of the bill. So, the fact that the complainant's name did not occur in the original, as it does in the alleged copy, is utterly immaterial in this controversy. The complainant's name is only inserted in the description of the judgment, and its insertion or exclusion does not affect the terms of the contract. If the difference exists, as stated in the answer, it produces no repugnancy of description; and the fact that the judgment is described by a statement of the names of all the defendants in the exhibit, while the defendant says it

was described in the original by the names of two of the defendants, does not affect the equity of the case; for it is certain that the judgment intended to be designated is that described with fullness in the exhibit.

[2.] No question of variance between the allegations and proof can arise. The equity of the bill may be maintained upon the allegation, that the principal of the complainant and defendant placed the draft in the hands of the latter, to pay off the debt. So far as the equity of the bill is concerned, the allegation as to the copy of the receipt is surplusage. It is appropriate evidence to sustain the material averment above noticed; and a court of equity will apply the receipt to the subject-matter intended, notwithstanding there may have been an incompleteness in the description. *Falsa demonstratio non nocet*.—Morris v. Taylor, 21 Ala. 779; Doe v. McClosky, 1 Ala. 736; Posey v. Decatur Bank, 12 Ala. 817; Johns v. Church, 12 Pick. 557. The complainant has one witness, who proves the handwriting of the receipt—that he made a copy of it, and that the exhibit is that copy. Upon the proof of this witness alone, the complainant's equity was sustained. The witness says that he has seen the defendant write, and that the signature to the receipt is his. There is implied in this an assertion that he knows the handwriting.

[3.] In the absence of circumstances which would make the application of the rule inequitable, one surety is entitled to share in the benefit of any indemnity which another may have received from the common principal, even though the indemnity may have been intended for the protection of the latter alone.—White v. Banks, 21 Ala. 705; Tyus v. De Jarnette, 26 *ib.* 280; Steele v. Manning, 24 *ib.* 285; Steele v. Brown, 18 *ib.* 700; Pinkston v. Taliaferro, 9 *ib.* 547. Upon this principle, it is clear that the complainant was entitled to participate in the indemnity placed in the hands of the defendant, unless some reason to the contrary is shown by the defendant. As a reason why the complainant should not share in the indemnity, it is contended, that he is indebted to Reed, the principal, in an amount exceeding the sum paid

by him as surety. The *onus* of sustaining this defense is upon the defendant. The declarations of Read, as to the amount of complainant's indebtedness, are entitled to no consideration, because they are not evidence against him. Excluding the statement of Read from view, the evidence fails to convince us that the complainant, upon an adjustment of his accounts with Read, aside from his suretyship, is indebted to him. The testimony of the complainant and defendant on this point is vague, and leaves the question in such doubt that it is impossible to affirm with confidence on which side is the balance of account between the complainant and Read. We rather incline to the opinion, that it is in favor of the complainant. As the *onus* of proof is upon the defendant, we must treat the defense upon this point as unsustained.

The defendant has sustained no injury by ordering his answer to be taken from the files. The answer which he substituted subserved every purpose useful to him and prejudicial to his adversary which the excluded answer would have done.

Our decision is not based upon any illegal testimony; and it is, therefore, not important that we should notice the defendant's exceptions to testimony.

The decree of the chancellor is affirmed.

STONE, J., not sitting.

DOWNING vs. WILSON.

[SLANDER FOR WORDS SPOKEN IMPUTING WANT OF CHASTITY.]

1. *What words are actionable.*—To say of a female, that a certain man “*keeps her*,” involves a charge of illicit sexual intercourse, when the words are understood in their ordinary, popular acceptance; consequently, under the Code, (§ 2220,) the words are, *per se*, actionable.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. JOHN GILL SHORTER.

THE complaint in this case was in these words:

“Elizabeth Wilson	} The plaintiff claims of the de-
vs.	
Matthew Downing.	} fendant twenty thousand dol-

lars, as damages for falsely and maliciously charging plaintiff with a want of chastity, by speaking of and concerning her, in the presence of divers persons, in substance as follows: ‘I am not afraid to say that Jemison Ware is keeping her (meaning plaintiff) in adultery’; ‘I believe that Jemison Ware kept her in adultery’; ‘I believe that Jemison Ware keeps her in adultery’; ‘I believe that Ware keeps her’; ‘Bud (meaning defendant’s son) and Edmund Wilkinson acknowledged that they gave it as their opinion that Jemison Ware was keeping the widow Wilson, (meaning plaintiff,) and I am not afraid to say so myself, for I believe it, and if she wants her character, she shall have it’;—thereby, and by each and all of the foregoing expressions, imputing to plaintiff a want of chastity, on (to-wit) the 1st August, 1856, and on divers other days between that time and the commencement of this suit.”

The defendant demurred to the entire complaint, “and to each specification thereof separately; the plaintiff waiving a specification of the grounds of demurrer, and joining in the demurrer.” The court overruled the demurrer, and its judgment is here assigned as error.

L. E. PARSONS, for the appellant, cited *Smith v. Gaffard*, 31 Ala. 45; *Kirksey v. Fike*, 29 Ala. 206; *Robinson v. Drummond*, 24 Ala. 174.

O. M. WATKINS, *contra*, cited *Thirman v. Matthews*, 1 Stew. 384; *Hogg v. Dorrah*, 2 Porter, 213; *Coburn v. Harwood*, Minor, 94; *Davis v. Johnston*, 2 Bailey, 579; *Mix v. Woodward*, 12 Conn. 262.

R. W. WALKER, J.—Whatever may have been the old doctrine on the subject, the rule is now well estab-

lished, that in actions of this kind the words charged as slanderous are to be understood by courts and juries, as by the rest of society, in their plain and common acceptation; in other words, according to their popular use and obvious import; and a forced construction is not to be put upon them, in order to relieve the defendant from the action.—Hogg v. Dorrah, 2 Porter, 218; Coburn v. Harwood, Minor, 93; Hugley v. Hugley, 2 Bailey, 592. The words “keep” and “kept” have, undoubtedly, several meanings; their precise signification in any given case depending on the context of which they form a part, or the circumstances under which they are used. But when it is said in reference to a female, that a certain man “keeps her,” the ordinary and popular interpretation of the expression is, that the relation between the parties is one which involves illicit intercourse. This has been the popular sense of the word, when thus used, at least as far back as the last century. In Lord Mansfield’s youthful days, one of the Reverend Bench of Bishops having charitably established an alms-house, at his own expense, for twenty-five poor women, Mr. Murray was applied to for an inscription, to be placed over the portal of the house; upon which he took up his pencil, and immediately wrote the following: “Under this roof, the Lord Bishop of —— keeps no less than twenty-five women.” We are not informed that the inscription proved acceptable. If it had been adopted, and carved in enduring marble over the portal, there is but little doubt that the reputation of the reverend prelate for pure morals would have suffered in the estimation of posterity.—See Carslake v. Mapledoram, 2 Term R. 472. As the words objected to involved a charge of a want of chastity, they were, under the Code, (§ 2220,) actionable *per se*.

Judgment affirmed.

TRAVIS *vs.* FRIERSON.

[BILL IN EQUITY TO CORRECT ERRORS IN SETTLEMENT OF GUARDIANSHIP.]

1. *Averments of bill.*—In a bill to correct errors of law and fact in the final settlement of a guardian's accounts before the probate court, (Code, §§ 2041, 1915-16,) an averment "that said account was stated and filed to suit the embarrassed state of said guardian," without a specification of the particular errors complained of, is not sufficiently precise and definite.

APPEAL from the Chancery Court at Tuscaloosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the appellant, for the purpose of correcting alleged errors of law and of fact in the final settlement of the accounts of his late guardian, Gideon B. Frierson, before the probate court. It alleged, that the said guardian had removed from the State since the settlement was made; and Robert P. Frierson, as the sole surviving surety on the guardian's bond, was the only defendant. The chancellor sustained a demurrer to the bill, for want of equity, on account of the indefiniteness of its allegations; and his decree is now assigned as error.

WM. P. WEBB, for appellant.

E. W. PECK, *contra*.

STONE, J.—We have looked carefully into the averments of this bill, and concur with the chancellor, that it does not present a case for equitable relief. It should specify the errors complained of, and not leave them to be gathered inferentially from the vague charge, "that said account was stated and filed to suit the embarrassed state of said guardian." More precision is required in chancery pleadings, than is found in this bill.—*Langdon v. Roane*, 6 Ala. 518; *Cowan v. Jones*, 27 *ib.* 317; *Mays*

v. Steele, in manuscript. See, also, Cunningham v. Pool, 9 Ala. 615; Stewart v. Williams, 33 *ib.* 492; Mock v. Steele, 34 *ib.* 198.

Our attention was for a time attracted to the fact, that in the record from the orphans' court, attached to the bill, the order of publication directs notice to be set up at the court-house door, and does not add, "at three other public places." Looking into the bill, we find no averment which brings this question up; but, on the contrary, the bill avers, that "on or about the 18th day of November, 1853, the said Gideon B. Frierson made a final settlement of his guardianship." We must, then, deal with this case, as if the final settlement had, in form, conformed to the law. We will not, then, inquire whether the failure, if such was the case, to post notice at *three other public places* in the county, will furnish ground to invalidate the settlement. No such point is raised by the pleadings, and we will not discuss it.—Code, §§ 1805, 2039.

Decree of the chancellor affirmed.

HOWARD vs. COLEMAN.

[ACTION BY OWNER, AGAINST HIRER OF SLAVE, FOR NEGLIGENCE.]

1. *Indefinite objection to deposition.*—A motion to suppress a deposition, "because the witness did not answer material portions of the 3d, 4th, and 5th cross-interrogatories", is too general and indefinite.
2. *Relevancy of evidence rebutting negligence in treatment of hired slave.* In an action by the owner, against the hirer of a slave, to recover damages for the defendant's negligence and want of care in failing to furnish proper medical attendance to the slave while sick; it having been proved that, by the terms of the contract of hiring, plaintiff's agent, by whom the contract was made, assumed to pay for necessary medical services during the term, and had authority to make such contract,—evidence showing that the defendant informed the agent of the slave's sickness, and requested him to call in a physician, and that the agent refused to do so, and declared

himself satisfied with the defendant's personal attendance on the slave, is relevant and admissible for the defendant.

- [2.] *Proof of agency.*—It having been proved that the husband was absent from the place of his residence during the greater part of the time while a hired slave was sick at his house, and, when not absent from the place, was at home only at night; and that his wife had the management and nursing of the slave throughout his sickness,—this is sufficient proof of the wife's authority to act as agent of the husband, in reference to the slave, to authorize her to send a message to the owner, informing him of the slave's sickness, and requesting him, in accordance with the terms of the contract of hiring, to call in a physician.
3. *Relevancy of evidence rebutting negligence in treatment of hired slave.* In such action, the plaintiff having proved that the slave died of an infectious disease, contracted at the defendant's house during the term; and having introduced evidence tending to show that the defendant was unnecessarily absent from home during the slave's sickness, and neglected to give him proper care and attention while sick,—it is competent for the defendant to prove, in rebuttal, that the business in which he was engaged required his absence from home; that the nature of his business was known to the plaintiff when the contract of hiring was made, and that he contracted the disease of which the slave died while thus absent from home on business.
- [3.] *What is revisable.*—In civil causes, the appellate court will not notice any assignment of error which is not insisted on in the argument of the appellant's counsel.
4. *Proof of agency.*—If a mother makes a contract, in the presence of her unmarried daughter, and without objection on her part, for the hiring of a slave belonging to the daughter, this is sufficient, if unexplained by other evidence, to raise a legal presumption of the mother's authority to make the contract as agent of her daughter.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Miss Mary E. Howard, against Allen W. Coleman, to recover damages for the loss of a slave, named George, who was hired by plaintiff to defendant, for and during the year 1857, and who died of small-pox while in the defendant's possession during the term. The complaint contained two counts: the first alleging, that the defendant carelessly and negligently exposed the slave to small-pox, whereby he contracted the disease, from which he died; and the second, that he failed and neglected to provide proper and neces-

sary medical aid and attendance for the slave while sick. The material facts of the case, as disclosed by the evidence adduced on the trial, (all of which is set out in the bill of exceptions,) are these: The contract for the hire of the slave was made between the defendant and Mrs. Martha E. Howard, who was the plaintiff's mother; the plaintiff herself, to whom the slave belonged, being present at the time, but saying nothing. By the terms of the contract, the defendant agreed to pay one hundred dollars for the hire of the slave; "and Mrs. Howard agreed to pay the doctors' bills, if the slave was sick, during the year." Mrs. Howard and her daughter resided in the village of Richmond in said county, where the defendant had a store, though his residence was four miles distant in the country. In the spring of 1857, while in the northern cities buying goods, the defendant contracted the small-pox; but the disease did not manifest itself until after his return home. Before he recovered, his wife and two of his servants were also taken sick with the same disease; and it was afterwards communicated to the slave George, who, after two weeks illness, died. The plaintiff introduced evidence showing that the defendant failed to call in a physician to the slave, and other evidence tending to show that he was unnecessarily absent from home during the slave's sickness, and neglected to furnish him with proper medicines, nursing, &c.; while the defendant offered evidence conducing to prove that the slave received the same care and attention with the members of his own family.

Before entering on the trial, the plaintiff moved to suppress the deposition of J. E. Todd, (which had been taken by the defendant,) "on the ground that said witness did not answer material portions of the 3d, 4th, and 5th cross-interrogatories." This witness was the father of the defendant's wife, and testified to the condition of the defendant's family during the prevalence of the small-pox, the alarm occasioned by it in the neighborhood, the difficulty of procuring a physician, the precautions adopted to prevent the disease from spreading, the manner in which the sick persons at the defendant's were nursed

and attended, &c.; and his answer to the 4th interrogatory was in these words: "As soon as it was ascertained that George had the small-pox, Mrs. Coleman (defendant's wife) sent for me, and requested me to go and see Mrs. Howard, and ask if she would not have a physician sent to visit George. When I delivered the message to Mrs. Howard, she told me that, as Mrs. Coleman had treated Mr. Coleman and his slaves who had the disease, she was fully satisfied and willing for her to continue to treat and manage George's case, as she had her own, all of whom had recovered; that she did not wish to have a physician sent for, and that she would be satisfied for George to be under Mrs. Coleman's treatment." The plaintiff objected to this answer, and moved the court to suppress it, "on the ground that it was illegal and irrelevant, and because there was no proof that the said message from Mrs. Coleman was sent by the defendant's authority, command, or consent." The court overruled each of these motions, and the plaintiff excepted.

The plaintiff read in evidence the deposition of her mother, Mrs. Martha E. Howard, who testified to the terms of the contract of hiring, and to several circumstances tending to show negligence and carelessness on the part of the defendant in the treatment of the slave while sick; and the defendant read in evidence the deposition of his daughter, Miss Martha C. Coleman, whose testimony tended to show that the slave received all needful care and attention. Several exceptions were reserved by the plaintiff to the rulings of the court on the admissibility of different portions of these depositions, which, however, require no particular notice. "The defendant asked a witness, how long he (defendant) had been merchandizing in Richmond? whether he went east to purchase goods? and how long he had been making such trips? The plaintiff objected to *this question*, as illegal and irrelevant; but the court overruled the objection, and allowed the witness to answer; and the witness said, that he had been merchandizing there for some two years; to which the plaintiff excepted."

“This being all the evidence, the plaintiff asked the court, in writing, to charge the jury as follows:

“‘1. Upon the hiring of a slave, if there is an agreement for the *hirer* (?) to pay the doctors’ bills, and this is the only stipulation, except the agreement for hiring, the law devolves the duty on the person hiring the slave, if he gets sick, and needs a physician, to call one in; and if he fails to do so, and thereby the slave is lost, the person hiring is responsible.’

“‘2. The agreement to pay the doctors’ bills, if there was no other special term of the contract, excludes any other; and if there was any such agreement, and there was a hiring of the slave by the defendant, then the law devolved upon him the duty, if the slave got sick, to give him such attention as a man of reasonable care and prudence would give to his property; and if the defendant failed to give such attention, and loss ensued, he is responsible’.

“‘3. If the negro was sick, and refused to take medicine, it was not the duty of the plaintiff, or her mother, to send some one to make him take the medicine, but it was the defendant’s duty to exercise his authority to make him take medicine; and if he did not do so, and a man of reasonable care and prudence would have done so, and loss resulted from it, then plaintiff is entitled to recover.’

“‘4. Upon a contract by the *hirer* (?) of a slave to pay for doctors’ bills, the hirer is bound, and has a right, to send for a physician when the slave is sick; and if the hirer fails to send a physician, and loss results from it by the death of the slave, the hirer is liable for the loss’.”

The court gave each of these charges, but with the following qualification: “If the jury believe from the evidence that the defendant hired the slave from Mrs. Howard, in the presence of the plaintiff, and without objection from the plaintiff, and it was then agreed that Mrs. Howard should pay the doctors’ bills for the slave; and if Mrs. Howard was in due time notified of the sickness of the slave, and was asked to procure medical aid for him, and declined to do so, and requested that the slave should be left under the care and prescription of the defendant’s

wife; and if the slave was so left under the care and prescription of the defendant's wife, and the defendant and his wife rendered due care and attention to the slave during his sickness,—then the defendant is not liable in damages to the plaintiff for the loss of the slave"; to which qualification the plaintiff excepted.

All the rulings of the court to which exceptions were reserved, are now assigned as error.

ALEX. & JNO. WHITE, for appellant.

BYRD & MORGAN, *contra*.

R. W. WALKER, J.—1. The court did not err in overruling the plaintiff's motion to suppress the deposition of J. E. Todd. The ground assigned for the motion was, that the witness "did not answer *material portions* of the 3d, 4th, and 5th cross-interrogatories." The objection was too general. The plaintiff should have specified *what* portions of the cross-interrogatories referred to the witness had failed to answer.

2. On comparing the objections made by the plaintiff to certain portions of the testimony of the witness Todd with the deposition of the witness as set out in the record, it is obvious that, either in transcribing the bill of exceptions, or in the bill of exceptions itself, the objections have by mistake been applied to the answers to the 3d, instead of the 4th interrogatory. Accordingly, we shall consider the objections as referring to the answers to the 4th interrogatory. The evidence conduced to show, that Mrs. Howard was the agent of her daughter to hire the slave, and was authorized to control the medical attendance which might be needed by the slave while in the defendant's possession. On the supposition that Mrs. Howard was such agent, and had such authority, evidence showing that the defendant had sent her a message, informing her of the sickness of the slave, and requesting her to send a physician, and of her response to such message, would have been competent testimony for the defendant. The message detailed by the witness was, however, sent by Mrs. Coleman, not by her husband; nor was he

present at the time. But it appears that the evidence which the plaintiff had offered tended to show that the defendant was absent from home during a considerable portion of the time of George's sickness; that when not absent, he was at home only at night: and that Mrs. Coleman had the management and nursing of George throughout his sickness. These facts certainly tended to establish that Mrs. Coleman was so far authorized to act for her husband in reference to the slave, as to send to Mrs. Howard the message alluded to.—See 1 Parsons Contr. 287–8, note (b.) We think, therefore, that there was no error in refusing to exclude from the jury the evidence in relation to that message, and the answer thereto which was sent by Mrs. Howard.

3. The obvious purpose of some of the testimony introduced by the plaintiff, was to show that the defendant was unnecessarily absent from home, and neglected the slave during his sickness. To rebut this evidence, it was competent for the defendant to prove that he was engaged in business which required him to be thus absent. In this view, the question put to one of the witnesses, as to defendant's being engaged in merchandising in Richmond, might, perhaps, be considered as at least not plainly irrelevant. Moreover, there was no error in permitting the defendant to prove the circumstances under which the small-pox had been introduced into his family. Such evidence might be important, for the purpose of rebutting the idea that the slave had contracted the disease through any fault or neglect on the part of the defendant. With the view of explaining how it was that he had brought the disease into his family, and in connection with the fact that he contracted it while on a visit to New York, it was not improper for the defendant to show that he had been for some time engaged in business which frequently rendered it necessary for him to make such trips to the northern cities. The force of such testimony would be strengthened by showing that the defendant's habit in this particular was known to Mrs. Howard when she hired him the negro; and the jury might, perhaps, infer such knowledge from the fact that the defendant was merchan-

dising in the village in which Mrs. Howard and her daughter resided.

Other exceptions were taken to the rulings of the circuit court, in relation to the evidence; but they are not insisted on in the argument of the counsel for the appellant, and, according to the well settled practice of this court, we do not notice them.

4. The court gave the charge which was asked by the plaintiff; but added a qualification, which was obviously based on the idea, that if the defendant hired the negro from Mrs. Howard, in the presence of, and without objection from her daughter; and it was agreed, as part of the contract, that Mrs. Howard should pay the doctors' bills for the slave, this was, if unexplained by other facts, sufficient to bind the daughter to the contract thus made, and to create the presumption that Mrs. Howard was authorized to control the medical attendance which might be needed by the slave during the term of hiring. We think that would be the legal effect of the facts supposed in the charge of the court. The charge must be construed in connection with the evidence; and it does not appear that there was any evidence to rebut or explain the legal presumption which, as we have just declared, arises from the facts referred to. This being the case, we see no legal objection to the charge which the court gave.

Judgment affirmed.

WALTHALL vs. GOREE.

[EJECTMENT BY WIFE'S HEIR, AGAINST HUSBAND'S ADMINISTRATOR.]

1. *Devise to husband and wife.*—At common law, under a devise to husband and wife during coverture, the entire estate vested in both of them as one person, and, on the death of either, continued in the survivor; but, under the statutes of this State creating and regulating the separate estates of married women, (Code, §§ 1981-97.)

such a devise creates the same estate in the parties as if it had been made before coverture; on the death of the wife intestate her undivided moiety descends to her heirs-at-law, subject to the statutory rights of her surviving husband during his life; and on the subsequent death of the husband, the wife's heirs become entitled to the possession of her undivided moiety.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. A. A. COLEMAN.

THIS action was brought by Caroline N. Goree, an infant suing by her next friend, against Leonidas N. Walthall, to recover the possession of a certain tract of land, which was particularly described in the complaint. The plaintiff was the sole child and heir-at-law of Mrs. Caroline M. Goree, deceased, who, at the time of her death, was the wife of Robert T. Goree; while the defendant held the possession of the land as the administrator of said Robert T. Goree. Mrs. Goree was the daughter of John Nelson, who died on the 6th March, 1855, and whose last will and testament contained a devise of the land here in controversy, in these words: "I will and devise to my daughter Caroline and her husband, Robert T. Goree, all that certain body of land," &c., describing it. This will was properly attested to pass real estate, and was duly admitted to probate. Mr. and Mrs. Goree were married on the 10th November, 1852. Mrs. Goree died, intestate, on the 31st October, 1856; and Mr. Goree died, also intestate, in January, 1858. The cause was tried on an agreed statement of facts, with the understanding that the decision of the court should be embodied in the form of a charge to the jury, with leave to either party to reserve a bill of exceptions, and to take an appeal. "Upon the foregoing facts, the parties submitted to the court the following questions: whether, on the death of Mrs. Caroline M. Goree, the entire estate in the lands in dispute survived and belonged to said Robert T. Goree solely, in fee; or whether the same, or any part thereof, descended to the plaintiff, as heir-at-law of said Caroline M. Goree, either at the time of her death, or at the death of the said Rob-

ert T. Goree. The court thereupon charged the jury, that said Caroline M. and Robert T. Goree were each seized of a moiety in said lands; that on the death of the said Caroline M., the entire estate in said lands did not survive and belong solely to said Robert T. Goree in fee, but only one-half thereof, while the other half descended to the plaintiff, as heir-at-law of said Caroline M.; and that the plaintiff is entitled to recover one-half of said lands." The charge of the court is assigned as error:

BROOKS & GARROTT, for appellant.—At common law, under a devise or deed to husband and wife jointly, during coverture, they did not take separate estates, and were not seized by moieties; but each was seized of the entirety, and the survivor took the entire estate.—Cruise on Real Property, vol. 1, pp. 363–65; 2 Bla. Com. 144; 2 Kent's Com. 132; 1 Co. Litt. § 285; 2 Jarman on Wills, 114; Morley v. Whiteman, 2 Dev. & Bat. 537; Needham v. Ransom, 5 Ired. 426; Den v. Hardenburgh, 5 Hals. 42; Jackson v. Stevens, 16 Johns. 110; Jackson v. McConnell, 19 Wend. 175; Harding v. Springer, 2 Shep. (Me.) 407; Brownson v. Hull, 16 Vermont, 309; Fairchild v. Chastelleaur, 1 Penn. St. R. 176; Stuckey v. Keefe's Executor, 26 *ib.* 397; Taul v. Campbell, 7 Yerger, 319; Ames v. Norman, 4 Sneed, 684; Gibson v. Zimmerman, 12 Miss. 385; Shaw v. Hearsey, 5 Mass. 531; Rogers v. Grider, 1 Dana, 242; Thornton v. Thornton, 3 Randolph, 179. But this principle was not founded on the incapacity of the wife to take by moieties with her husband. It depended on the words of the conveyance, and was confined to cases in which, if the grantees had not been husband and wife, the instrument would have created a joint tenancy between them.—Attorney-General v. Bacchus, 9 Price, 30; S. C., 11 Price, 547; Paine v. Wagner, 12 Sim. 157; 1 Ver. 233; 3 Y. & J. 531; 4 Dane's Abr. 770; Preston on Est., vol. 1, p. 132; 4 Kent's Com. 402.

Section 1312 of the Code, abolishing the right of survivorship between joint tenants, has no application to the case. Husband and wife, under a conveyance to them jointly during coverture, are not joint tenants, though sometimes

inaccurately so called. Joint tenants are seized, in technical language, *per my et per tout* ; husband and wife, *per tout* only. Joint tenants may have a severance, or partition ; but husband and wife cannot.—2 Bla. Com. 354 ; 3 Coke, 5 ; 9 *ib.* 140 ; 2 Vernon, 120 ; Roper on H. and W. 51 ; Prec. Ch. 1.

The provisions of the Code, relating to the separate estates of married women, do not affect the construction of this devise. The object of these provisions was to exclude the husband and his creditors from all right to property to which the wife might become entitled during coverture, where the husband, *jure uxoris*, by the operation of the common law, would become interested in, or entitled to it ; and all such property is declared to be the separate estate of the wife, and not to be liable for the payment of the husband's debts. If a separate estate is created in the wife by will or deed, the statute has no application, as this court has frequently decided ; nor does it apply in any case, where its application would at all conflict with any of the provisions of the will or deed. Wherever the statute applies, all the statutory incidents attach to the property ; and where any of these incidents conflict with the provisions of the deed or will, the statute does not apply. The statute cannot have the effect of enlarging the wife's estate, or changing its character. If an estate for life is granted or devised to her, the statute cannot enlarge it into an estate in fee. If a conditional estate is granted or devised to her, the statute cannot make it absolute and unqualified. How, then, under a devise which, independent of the statute, would create in the wife an estate for life, subject to be enlarged into an absolute estate in fee simple in the event of her surviving her husband, can the statute convert her interest into an absolute and unconditional estate in fee simple in one-half of the land ? The interest which the husband takes under the devise, is derived from the will—from the act of the testator—and cannot be affected by the statute. He takes nothing as trustee of his wife, nor would a decree of divorce, in favor of the wife, deprive him of the right to receive the rents and profits of the entire property.

In Tennessee, a statute similar to ours has been held not to apply to devises to husband and wife jointly. *Ames v. Norman*, 4 Sneed, 682.

J. D. WEBB, *contra*.—At common law, under the devise in this case, husband and wife would take as one person, with right of survivorship as an incident.—1 Chitty's Blackstone, book 2, p. 147; 2 Kent's Com. 132; 19 Wendell, 175; U. S. Digest, vol. 14 p. 345, §79; Hill on Trusts, 696, 630, 641. In Alabama, the right of survivorship is abolished by section 1312 of the Code. —2 Ohio, 305; 13 Ohio, 68; 11 Conn. 337. Independently of that statute, the other provisions of our system, in reference to the separate estates of married women, entirely abolish the rule of the common law above cited. These statutes are equally applicable to all property acquired by the wife during coverture, whether by descent, gift, or devise; in severalty, or jointly with another; in fee simple, or for life. By virtue of these statutes, the interest of the wife under the devise, whatever it may have been, became a part of her separate estate, and, on her death intestate, descended to her heirs-at-law.

R. W. WALKER, J.—According to the common law, a conveyance to husband and wife stands upon a footing, and has an effect, entirely different from a conveyance in the same words to any other two individuals. Under a conveyance to husband and wife during the coverture, they take neither as joint tenants, nor as tenants in common, but their interest is denominated a tenancy by entirety. They do not take by moieties—the whole estate vests in both of them as one person; each is seized of the entirety, *per totum*, not *per unum*; and on the death of either, the entire estate continues in the survivor.—1 Cruise, Real Prop. 363-5, §§ 44-5-6-7, &c.; 2 Coke's Lib. 1. (Butler & Hargrave's ed.) 187, (b); *Jackson v. Stevens*, 16 Johns. 110; *Jackson v. McConnell*, 19 Wend. 179; *Thornton v. Thornton*, 3 Rand. 179; *Stuckey v. Keefe*, 26 Penn. St. R. 397; *Rogers v. Henderson*, 5 Johns. Ch. 437; *Sutliff v. Flagey*, 1 Cow. 95; *Pollard v. Merrill*, 15 Ala. 174;

2 Kent, 132; 4 *ib.* 362: Williams on Real Prop. 208, and other authorities on brief of appellee.

A conveyance or devise to husband and wife, during coverture, must have the same effect with us as at common law, unless we have by legislation abolished the principle or reason of the common law, on which the rule above stated is founded.

The reason why, under a conveyance to husband and wife, they did not take either as joint tenants or tenants in common, is, that they were, according to the principles of the common law, incapable of so taking. The rule adverted to was not merely a rule fixing the construction of certain words in a deed or devise, when applied to husband and wife; for the result was the same, although the instrument expressly declared that the devisees or grantees should take as joint tenants, or tenants in common. The foundation of the rule is to be sought for in the rights and incapacities which, according to the common law, result from the matrimonial union. Under that system of jurisprudence, the husband and wife, though two natural persons, are but one person in law. Bracton says: "*Vir et uxor sunt quasi unica persona, quia caro una, et sanguis unus.*" The husband is quaintly described as "the head of the wife,"—the legal existence of the latter being as it were merged in that of the former. Being but one person, there can be no moieties between them; and they cannot, during the coverture, and under a conveyance to both, take separate estates in the same property. It is an obvious result of this unity of persons, that a conveyance to husband and wife is considered as a conveyance to a single person, under which they take but one estate, as a corporation; and the estate continues in the survivor, the same as if one of the corporators were to die. Because there can be no moieties between them, it is impossible for them to take, either as joint tenants, or as tenants in common; one characteristic of both these tenancies being, that the parties are seized by moieties. The distinction is, that joint tenants are seized *per my et per tout*, while tenants in common are seized *per my*, but not *per tout*.

The authorities fully sustain this statement of the reasons on which the common-law rule, prescribing the effect of a conveyance to husband and wife, is founded. Littleton, after stating the rule, says, that "the cause is, for that the husband and wife are one person in law."—2 Co. Litt. 187, (*a*). Blackstone says, that "husband and wife being considered as one person, they cannot take the estate by moieties, but both are seized of the entirety." 2 Blacks. Comm. 182. Chancellor Kent says: "They are not properly joint tenants, nor tenants in common; for they are but one person in law, and cannot take by moieties." "This species of tenancy arises from the unity of husband and wife."—2 Kent, 132. So with the adjudged cases: they all proceed, not on any supposed intention of the parties to the conveyance, but on the sole ground of the incapacity of husband and wife, who are regarded as one person in law, to take "during coverture separate estates in property which is conveyed to both of them."—Green v. King, 2 Black. R. 1211; Jackson v. Stevens, 16 Johns. 115; Ames v. Norman, 4 Sneed, 692; Barber v. Harris 15 Wend. 617; Stuckey v. Keefe, 26 Penn. St. R. 397; Rogers v. Henderson, 5 Johns. Ch. 437; Pollard v. Merrill, 15 Ala. 174; 4 Kent, 362; 1 Greenl. Cr. 363, §§ 44–5; 1 Thomas' Coke, note on p. 741; Bell on Property of H. & W. 396; Bredon's case, 1 Coke's R. 193, note to Thomas & Fraser's edit. In accordance with this view it has been held, and upon reasoning entirely conclusive, that husband and wife cannot, by any words in a grant to them during coverture, be made either joint tenants, or tenants in common.—Stuckey v. Keefe, 26 Penn. State R. 397; Johnston v. Hart, 6 W. & S. 319; Dias & Burn v. Glover, 1 Hoff. Ch. R. 71.

This exposition of the reasons on which the rule is founded, derives confirmation from another well settled principle of the common law—namely, that where an estate is conveyed to a man and a woman, who after the conveyance intermarry, as they originally took by moieties, so they will continue to hold by moieties after marriage.—Coke's Litt. 187. (*b*); 1 Greenl. Cr. 365, § 50; Stuckey v. Keefe, 26 Penn. St. 403; Ames v. Norman,

4 Sneed, 696; 4 Kent, 363. The reason of the distinction, between the effect of a conveyance to husband and wife before marriage, and one after, is found in the fact, that in the former case, the grantees are two legal persons, and as such capable of taking separate estates in the same property; whereas, in the latter case, the grantees together constitute a single person, and the estate is, therefore, conveyed and taken as an entirety, and not by moieties. Authorities *supra*.

It thus appears, that a grant to husband and wife would create a joint estate, but for the common-law principle, that by the coverture the legal existence of the wife is so completely incorporated into that of her husband, that she forms with him but one person, and is placed under an absolute incapacity to take by moieties with him, or to receive interests separate from his, in an estate conveyed to them during coverture.

"Article 3, chapter 1, title 5, part 2 of the Code, relates expressly to separate estates of married women.—Code, p. 380. The seventeen sections which compose that article, embody the principles of a new policy in reference to married women, which was unknown to the common law." *Smith v. Smith*, 30 Ala. 643. One of the principles embodied in the provisions of the Code here referred to is, that the distinct existence of the wife as a legal person is so far recognized as to enable her to take an estate separate from the husband.—Code, §§ 1982–3, &c. By this legislation, the one legal person of the common law has been resolved into two distinct persons, so far at least as the capacity of taking separate estates is concerned. Since the Code, therefore, a devise to husband and wife is not a grant to a single person, but to two persons, each of whom is capable of taking a separate estate. Both of the grantees being capable of taking separately, it is impossible that they should take by entireties, as if they constituted a single person. Of necessity, they take by moieties. Being thus invested with the capacity of taking by moieties, the reason on which the rule of the common law was founded has ceased to exist; and a devise to husband and wife must stand upon the same footing, and create

the same estate, as if it had been made before coverture, to parties who afterwards intermarried.—4 Kent, 363.

Mr. Goree did not become entitled, as surviving joint tenant, to the whole estate; for, by our statute, the *jus accrescendi* in joint tenancies is abolished, and the interest of a joint tenant, dying before severance, descends and vests as if it had been severed and ascertained.—Code, §1312.

In fact, although, since the Code, when land is granted to husband and wife, they take by moieties; yet they do not hold to each other, in all respects, the relation either of joint tenants, or tenants in common. For, although the Code has so far invested the wife with the rights of a legal person, as to enable her to take by moieties with her husband, it has by no means abrogated all, or even most, of the common-law disabilities of coverture. Husband and wife are still incapable of suing, or of contracting with each other; and though the wife may take a separate estate, she cannot convey it, without her husband's concurrence. It is obvious, therefore, that the ordinary incidents of joint tenancy and tenancy in common cannot attach to an estate held by husband and wife. They cannot release to each other, nor make partition by contract, nor compel it by writ of partition. The wife cannot convey her share without her husband's concurrence, nor can common-law actions of partition, or waste, or account, or ejectment, be maintained by one against the other. They do, however, take and are seized by moieties, and the wife's moiety is her separate estate under the Code.

Our conclusion is, that under this devise in the will of her father, Mrs. Goree took an undivided moiety in the land, as her separate estate under the Code; that the same vested in her husband as her trustee; that on her dying intestate, leaving a husband living, her estate in the land descended to her daughter, as her sole heir, subject to the statutory right of Mr. Goree, as husband, to have the use of the property during his life; and that at his death, the daughter became entitled to the possession.—Code, §§1582-3, 1590.

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7. *Same*.—A court of equity will not set aside an award, on the application of a party who, more than two years before the filing of his bill, voluntarily paid more than one-half of the amount found against him by the arbitrators, and gave his notes for the residue; and who, if he had exercised ordinary prudence and circumspection, would have been fully informed before he executed it of the existence of the facts on account of which he seeks to set it aside..... 583

ASSUMPSIT.

1. *When recovery may be had under common counts*.—Under a complaint containing only the common counts for money had and received, and for goods sold and delivered, a recovery cannot be had for the breach of a special contract, by which the plaintiff authorized the defendant to sell a horse belonging to them both jointly, and which the defendant violated by exchanging the horse for another, and retaining the latter as his own property.—*Fuller v. Duren*..... 7
- See ACTION, 1, 2, 3.

ATTACHMENT.

1. *Want of affidavit not available on error*.—In an action against a non-resident, commenced by attachment, the want of the statutory affidavit, or the failure of the record to set out the affidavit if made, (Code, §§ 2561–62,) is not available on error, after judgment by default.—*Dow v. Whitman & Ousley*..... 604
2. *Publication against non-resident*.—A recital in the judgment, that “publication was made giving defendant notice according to law,” (Code, § 2510,) is not sufficient, on appeal, to sustain a judgment by default against a non-resident..... 604
3. *What constitutes assignment of note, as against attaching creditor*.—Where a debtor places promissory notes, payable to himself, in the hands of an agent, with written instructions to collect them, and to pay over the proceeds to certain specified creditors, this does not amount to an assignment or transfer of the notes, either to the specified creditors, or to a surety who afterwards pays their debts, as against a subsequent attaching creditor.—*Clark, Austin & Smith v. Cilley*..... 652
4. *Assignment against a lien*.—A public or municipal corporation is not amenable to the process of garnishment, under the laws of this State; and this exemption involves no violation of the first article of the constitution, which declares that “no set of men are entitled to exclusive, separate emolu-

ATTACHMENT—CONTINUED.

- ments or privileges, but in consideration of public services." Clark & Saunders v. Mobile School Comm'rs. 621
5. *Garnishment on judgment by justice of the peace.*—Under the provisions of the Code, (§§ 2471, 2819,) a justice of the peace has authority to issue a garnishment on a judgment rendered by him.—Gould v. Meyer 565
6. *What constitutes record of garnishment case.*—Where a justice of the peace sends up to the circuit court, in return to a *certiorari*, the affidavit made before him to procure the issue of a garnishment on a judgment, the summons served on the garnishee, the garnishee's answer, the judgment thereon rendered against him, and a statement of the original judgment,—this is, *prima facie*, a sufficient return of the proceedings had in the garnishment case; and it is incumbent on the party who objects to its sufficiency to show affirmatively that there were other proceedings 565
7. *Waiver of objection by garnishee to affidavit and summons.*—After a garnishee has appeared and answered, admitting an indebtedness to the defendant, and a judgment has been thereon rendered against him, and he has transferred the cause to the circuit court by *certiorari*, he cannot there raise an objection, for the first time, either to the affidavit, or to the summons of garnishment 565
8. *Waiver of right to answer anew.*—If the garnishee, after the rendition of judgment against him by the justice, removes the cause by *certiorari* into the circuit court, and there fails to appear, he cannot complain on error that he was not permitted to answer anew in the circuit court. 565
9. *Sufficiency of garnishee's answer.*—Where the garnishee's answer admits an indebtedness to the defendant, (there being two defendants to the original judgment,) and the antecedent proceedings against him show which one of the defendants is meant, this is sufficient to sustain a judgment against him as the debtor of that defendant. 565
10. *Answer of garnishee, and who may defend for him.*—On the failure of the garnishee to appear and claim the right to answer anew in the circuit court, his petition for the *certiorari* cannot be received and treated, on motion of his counsel, as a new answer to the garnishment; nor can his surety on the *certiorari* bond be allowed to defend for him. 565
11. *When action lies for suing out attachment.*—In an action to recover damages for the wrongful and malicious suing out of an attachment, a charge, instructing the jury, "that if the defendants did not sue out the attachment with malice, or from a disposition to vex or harass the plaintiff, but honestly believed that they had reasonable and probable cause to sue out the attachment," then the plaintiff was not entitled to recover, asserts a correct legal proposition.—Benson & Co. v. McCoy. . . 710

ATTACHMENT—CONTINUED.

12. *Same*.—The fact that a non-resident debtor, against whom an attachment is here sued out by a non-resident creditor, did not have sufficient property in the State of his residence to pay all the debts then and there owing by him, although sufficient to pay the debt of such attaching creditor, (Code, § 2509,) is no defense to an action on the attachment, to recover damages for the wrongful suing out of the writ.—*Jones v. Lawrence* 618

ATTORNEYS-AT-LAW.

1. *Attorney's right to practice before municipal court*.—Although a quasi-criminal proceeding before the mayor of Mobile, for an alleged violation of a municipal ordinance, is neither a "criminal prosecution," nor a "civil cause," within the meaning of the 10th and 20th sections of the 1st article of the constitution, securing to a party the right "to be heard by himself and counsel;" yet, under section 730 of the Code, construed in harmony with the general spirit and policy of these constitutional provisions, an attorney-at-law who has been regularly licensed by the supreme court, and who has taken the prescribed oath, has a legal right to appear, when employed for that purpose, as counsel for persons who are on trial before the mayor for alleged violations of the municipal laws; and, under section 3403, he has also a right to appear as counsel for the accused on a preliminary investigation before the mayor as committing magistrate.—*Withers v. The State*..... 252
2. *Power of court to remove or silence attorney*.—For any disrespectful or contemptuous behavior in court, tending to impair the respect due to judicial tribunals, or to interrupt the due course of trial, an attorney may be punished at the time for contempt, (Code, §§ 561-3;) and for any willful violation of professional duty he may be removed or suspended from his office, (§§ 747-61:) but, until he has been removed or suspended by the judgment of the circuit court, rendered in a statutory proceeding instituted for that purpose, no court can exclude him from practice at its bar, on account of any disrespectful language or conduct on a past occasion..... 252
3. *Agreement of counsel, for entry of decree by consent, enforced against party*.—Under a bill for the dissolution and settlement of a mercantile partnership, a written agreement between the counsel of the respective parties, stating the terms of the decree to be entered up by consent, held to have been properly enforced by the chancellor, against the objection of one of the parties, supported by his own affidavit, on the ground of errors and mistake; the affidavit being controverted by the oath of the opposite party, and no evidence being adduced in support of it.—*Charles v. Miller*..... 141

BAIL.

1. *Right of bail on account of continuances.*—The right to bail in capital cases, on account of continuances by the State, (Code, §§3671-72,) is confined to cases which have been twice continued "for the testimony of absent witnesses."—*Ex parte Carroll & Adcock*..... 301
2. *Procedure on applications for bail.*—When an application for bail is made to a circuit judge, and is by him refused, the party may have the evidence set out in a bill of exceptions, (Code, §3673,) and make application thereon to the supreme court for bail; but he cannot make a second application to a circuit judge, founded on cumulative evidence discovered since his first application; nor can he bring the first application before the supreme court for review, by making the proceedings then had a part of his second application, and reserving a bill of exceptions to the refusal of the second application..... 301
3. *Same.*—When a party who is in custody has sued out a *habeas corpus* before a circuit judge, who refuses to discharge him, he may then make application to the supreme court, to revise the action of the circuit judge; but the facts on which the action of the circuit court was based must be brought to the notice of the supreme court.—*Ex parte Cleveland*..... 306
4. *Sufficiency of recognizance, and admissibility of parol evidence in aid of it.*—A demurrer does not lie to a *scire facias* against bail, because the offense charged in the indictment is intentionally injuring telegraph wires, while in the *capias*, bail-bond and *scire facias*, it is described as malicious mischief; nor can the bail avail themselves of the supposed variance by motion to exclude the *capias* and bail-bond; but those papers may be connected with the indictment to which they relate, by the parol testimony of the sheriff and clerk.—*Welch v. The State*..... 277

BAILMENT.

1. *Rights and liabilities of hirer of slave.*—Under a general contract of hiring, the hirer has no right to employ the slave in assisting to raise a gin-house on his plantation, or to hire or loan him to another to be so employed, if that service involves greater danger than prudent masters are usually willing to have their slaves exposed to; yet, if the slave is hired for the specific purpose of being employed as a plantation hand, and it becomes necessary to erect a gin-house on the plantation during the term, and that service is commonly performed by plantation hands whenever it is needed, the hirer is authorized to employ him in that service, provided he exercises due care and prudence to prevent accident or injury; but he cannot hire, or loan the slave to another, for the specific purpose of being so employed, if that service involves greater danger than the ordinary labor of plantation hands.—*Jones v. Fort*. 440

BAILMENT—CONTINUED.

2. *When sub-bailee of hirer is liable in trover.*—If the hirer of a slave under a general contract, or under a special contract for his employment as a plantation hand, gratuitously lends him to another person, for the specific purpose of being employed in raising a gin-house, and the slave is killed while so employed, the sub-bailee is liable to the owner for his value, in trover, no matter what degree of care he exercised in having the work performed, although he had no notice of the owner's title, and no reason to suppose that the hirer was not the owner..... 449
3. *Bailment of note as collateral security.*—When a note is endorsed and transferred as collateral security, a subsequent payment of the original debt by the transferrer operates as a re-transfer to him of the endorsed note; and if the creditor, or his personal representative, refuses to deliver the note on demand, trover lies against him for the conversion.—*Overstreet v. Nunn's Executors.*..... 649
4. *Same.*—If the debtor afterwards pays his original debt in full, he may maintain an action at law against the creditor, to recover money collected on the transferred note before the payment of the original debt.—S. C..... 695

BILL OF EXCEPTIONS.

1. *When necessary.*—A defendant in a summary proceeding, having been brought into court by the service of a legal notice, cannot object on error to the allowance of an improper amendment of the notice, unless he reserved the point by bill of exceptions at the time of the allowance of the amendment. *Simmons v. Varnum.*..... 92
2. *Same.*—The refusal of the circuit court, on sustaining a demurrer to a plea, to allow the defendant leave to plead over, is not revisable on error, unless an exception was reserved to it.—*Powell v. Asten.*..... 140
3. *Execution of.*—The term of the circuit court having expired by law at twelve o'clock on Saturday night, a bill of exceptions, signed by the presiding judge on the next morning, "before the verdict and judgment and sentence of the court, or either of them, had been entered on the minutes of the court, and before the minutes were signed," cannot be considered as having been signed during the term.—*Bryant v. The State.*..... 271

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Note presumptive evidence of settled accounts.*—On settlement of accounts between a debtor and his creditor, a note being given for the ascertained balance, an order, previously given by the creditor to a third person, if then accepted or paid, is pre-

BILLS OF EXCHANGE, AND PROMISSORY NOTES—CONTINUED.

- sumed to have entered into the settlement.—Ala. & Miss. Railroad Co. v. Sanford & Reid..... 703
2. *Burden of proof; failure of consideration of note.*—In an action on an unconditional promissory note, given for professional services to be rendered by the payee as an attorney-at-law, and payable on a day certain, the *onus* is not on the plaintiff to prove performance of the stipulated services, but on the defendant to show a failure of performance; and proof of the fact that the attorney was absent at the first ensuing term of the court in which the cause was pending, and that the cause was compromised by the parties before the next term, without more, does not even tend to establish a failure of consideration.—Douglass v. Eason..... 687
3. *What constitutes assignment of note, as against attaching creditor.* Where a debtor places promissory notes, payable to himself, in the hands of an agent, with written instructions to collect them, and to pay over the proceeds to certain specified creditors, this does not amount to an assignment or transfer of the notes, either to the specified creditors, or to a surety who afterwards pays their debts, as against a subsequent attaching creditor.—Clark, Austin & Smith v. Cilley..... 652

BILL OF PARTICULARS.

See ACCOUNT, 1.

CHANCERY.

I. JURISDICTION.

1. *Equitable relief against award.*—A court of equity will not set aside an award, on account of an objection of which the complainant was fully advised at the time he executed it.—Willingham v. Harrell..... 583
2. *Same.*—A court of equity will not set aside an award on the application of a party who, more than two years before the filing of his bill, voluntarily paid more than one-half of the amount found against him by the arbitrators, and gave his notes for the residue; and who, if he had exercised ordinary prudence and circumspection, would have been fully informed before he executed it of the existence of the facts on account of which he seeks to set it aside..... 583
3. *When widow may come into equity, against husband's administrator.* A widow cannot maintain a bill in equity, against the administrator of her deceased husband, to recover money belonging to the *corpus* of her statutory separate estate, which the husband had received in his life-time, and had not paid over or accounted for. (A. J. WALKER, C. J., *dissenting*).—Bennett's Adm'r v. Bennett..... 571

CHANCERY—CONTINUED.

4. *When wife's administrator may come into equity.*—The personal representative of the wife cannot maintain a bill in equity, against the personal representative and heirs-at-law of the husband, to recover property which accrued to the wife after her desertion by the husband; which was claimed, held and controlled by her as a feme sole; of which the husband never had possession, and to which he never asserted any claim or title. *Bell's Adm'r v. Bell*..... 195
5. *When administrator may come into equity.*—The administrator of a deceased tenant for life cannot come into equity, to recover property which he claims as emblements accruing during the year in which his intestate died; his remedy at law being adequate and complete.—*Coleman v. Camp*..... 160
6. *When debtor's beneficial interest in trust property may be subjected in equity to payment of debts.*—Under a deed of gift, by which slaves and other personal property are conveyed to a trustee, for the separate use and benefit of the grantor's daughter, then a married woman, and her children, free from the control, debts and liabilities of her husband; with a further stipulation, that the trustee "shall and will, at all times hereafter, permit all, or such portion of said property, to be and remain in the possession and under the control of" the daughter, "as shall and may be necessary for the welfare and comfort of her and her children;" provided, that the trustee "may and shall, at any and all times, have the right and authority to take possession of said property, should he deem it necessary and proper for him so to do, and to manage and employ the same as shall be to the true interest and benefit of herself and her children," although no portion of the trust property can be sold for the payment of the daughter's debts, her share of the income and profits may be severed and applied in equity. (*Rice, C. J., dissenting.*)—*Robertson & Pettibone v. Johnston*..... 197
7. *Settlement of decedents' estates.*—After the settlement of a decedent's estate has been commenced in the probate court, it cannot be removed into the chancery court, by either party, without the assignment of some special reason justifying the interposition of equity.—*Park v. Park*..... 132
8. *Same.*—In this State, the chancery court retains its original jurisdiction over the administration of decedents' estates, and may be appealed to by a proper party, before the concurrent jurisdiction of the probate court has attached, without the assignment of any special reason; but, to authorize an executor or administrator to seek its aid and instruction, he must show some special circumstances, requiring or justifying its interposition.—*McNeill v. McNeill*..... 109
9. *Same.*—Neither the fact that the administrator, before the expiration of eighteen months from the grant of administration,

CHANCERY—CONTINUED.

- and before he ascertained that the estate would prove insolvent, paid debts not of a preferred class; nor the fact that he was the surety of his intestate, on one of the debts so paid, which was a note given for the purchase-money of land; nor the fact that he has a controversy with a commission-merchant, to whom he shipped the cotton belonging to the estate, and by whom the proceeds of sale were retained, under an alleged contract with the intestate in his life-time, in payment of balance due for advances,—authorizes the administrator to come into equity..... 199
10. *Marshaling assets between legatees and heirs-at-law.*—A creditor will not be allowed, in equity, to enforce satisfaction of his debt out of slaves specifically bequeathed, when the legatee shows that there are descended lands, which, as between himself and the heir-at-law, ought to be first subjected, but will be required first to exhaust the latter fund; but, when the effect of such arrangement would be to lessen or impair the obligation of the creditor's contract, or to subject his claim to any additional peril, or to unreasonably delay him in the enforcement of it, the court will not thus interfere; consequently, when it is not shown who the heirs-at-law are, nor whether they are within the jurisdiction of the court, and it appears that, while the specific legatees are precluded by a former decision of the court from contesting the justice of the creditor's demand, the testator was in fact an infant when the liability was contracted, and that the only evidence of the debt is a judgment rendered against the executor, the creditor will be allowed to pursue his remedy against the specific legatees. *Sanders v. Godley's Adm'r.*..... 50
11. *Injunction of probable nuisance.*—A private stable, near a church, not being necessarily a nuisance; and the probable inconvenience that may result from its use, to the congregation worshipping in the church, not being a mischief of that vast and overwhelming character which authorizes the interference of a court of equity in advance of a trial at law,—the chancery court will not enjoin its erection, at the instance of the corporate authorities of the church, on the ground that it will be a nuisance.—*St. James Church v. Arrington.*..... 546
12. *Contract held conditional sale, and not mortgage.*—A written instrument, signed by the defendant, reciting that he had purchased from the complainant several slaves, specifying the name and separate value of each, and then stipulating that, if the complainant "shall redeem, or cause to be redeemed, any part of said negroes within seven years," the defendant would make a specific deduction from the value of each, —whether considered by itself, or in connection with an absolute bill of sale, executed on the next day, which acknowledged the receipt of the money in full payment for the slaves, and con-

CHANCERY—CONTINUED.

- tained a warranty of soundness and title, is a conditional sale, and not a mortgage; nor will a court of equity declare the contract to be a mortgage, on proof that the complainant at first applied to the defendant for a loan of money, or other pecuniary aid—that the defendant declined to loan money, but made another proposition in reply, to which the complainant did not accede; and that by the arrangement finally concluded between them, the defendant assumed a large debt due from the complainant to a third person, took the negroes at the prices in the writings above mentioned, and received from the complainant his several promissory notes for the difference between the aggregate price of the slaves and the amount of the assumed debt; there being no proof of fraud, imposition, or unfairness, nor any great disparity between the value of the slaves and the price agreed to be paid.—*Swift v. Swift*..... 147
13. *Reformation of conveyance; laches*—The lapse of three years, between the discovery of the mistake and the filing of the bill to correct it, does not show such laches as will deprive the party of the right to relief, when it appears that the defendant was insolvent, and that the plaintiff made repeated efforts to have the mistake corrected without the expense of a law-suit. *Thompson v. Marshall*..... 501
14. *Same; insufficient attestation of instrument*.—It is no objection to the reformation of a conveyance, embracing both real and personal property, that it is not attested in such manner as is necessary to pass the title to the realty..... 504
15. *Same; adverse possession*.—The validity of a conveyance, *inter partes*, not being affected by the fact that the property was adversely held at the time of the execution of the instrument, such adverse possession constitutes no objection to the reformation of the instrument in equity..... 504
16. *Same; statute of frauds*.—The fact that a contract in writing, signed by only one of the parties, contains stipulations to be performed by the other which are within the statute of frauds, will not prevent a reformation of the instrument in equity at the suit of the latter..... 504
17. *Removal of husband as trustee*.—A deliberate and permanent abandonment of the wife by the husband, without reasonable cause, is sufficient (Code, § 1994) to authorize his removal from the trusteeship of her statutory separate estate.—*Boaz v. Boaz*. 334
18. *Removal of mother from custody of infant children*.—The chancery court will remove infant children from the custody of their father or mother, whenever it is clearly shown that their morals, safety or interests require their removal; but this jurisdiction is one of extreme delicacy, and will only be exercised in cases of gross misconduct on the part of the parent, or inability from some cause to furnish proper nurture and training

CHANCERY—CONTINUED.

- for the child. The fact that the second husband of the mother, who shares with her the care and management of her infant children, is not a man of unexceptionable morals, and is addicted to profanity, even in the presence of his family, is not sufficient cause for the removal of the children from the custody of the mother, against her wishes, when it is shown that they are treated kindly, are well fed, well clothed, and sent to school; that no charge is made for their board and lodging, and that they are of such tender years as to require their mother's constant watchfulness and care.—*Striplin v. Ware*, 87
19. *Purchase by administrator at his own sale set aside*.—The chancery court has jurisdiction, at the suit of the distributees of an intestate's estate, to set aside a sale by the administrator of personal property, under an order of the probate court, at which the administrator himself became the purchaser.—*Payne v. Turner*,..... 623
20. *Same*.—The purchase of a slave by the administrator in this case, at a sale made by himself under an order of the probate court, was set aside at the instance of the distributees of the estate, on proof that very few persons were present at the sale; that only one bid was made; that the price at which the slave was knocked off was less, by \$200 to \$400, than her real value; that the administrator made no effort to attract a crowd at the sale, and declined to impart information as to the time and place of sale to the intestate's father, who, as he knew, desired to purchase..... 623
21. *Purchase by executor and guardian at his own sale*.—The defendant having married the complainants' mother, who was at the time their guardian by appointment from the probate court, and also executrix of their deceased father's will; and having afterwards procured from the probate court, as executor in right of his wife, an order for the sale of decedent's real estate, which was devised to the complainants jointly with their mother; and having himself become, through an agent, the purchaser at the sale,—the sale was set aside at the instance of the infant devisees although no fraud, unfairness, or inadequacy of price was shown.—*Calloway v. Gilmer*..... 354
22. *Purchase by mortgagee at his own sale*.—A purchaser of land, having executed to his vendor a mortgage to secure the payment of the purchase-money, and having afterwards resold the land to a third person, who agreed that he would discharge the unpaid balance due to the vendor, and that the land should remain bound by the mortgage, is not within the rule which forbids a mortgagee to purchase at his own sale, and may become the purchaser at the sale under the mortgage. *McNeill v. McNeill*..... 109
23. *Same*.—The wife of the mortgagor, claiming under a voluntary conveyance from her husband subsequent to the mort-

CHANCERY—CONTINUED.

- gage, may, in equity, impeach the validity of the sale under the mortgage; and if her bill alleges that the mortgage debt was nearly (if not quite) paid, that the mortgagee concealed from her the true state of the account between himself and the mortgagor, had the property sold for a pretended debt greater than was actually due, and, in effect, became himself the purchaser at the sale, she makes out a case for equitable relief.—*Cain v. Gimon*..... 168
24. *Equitable assignment of vendor's lien*.—An unqualified endorsement of a promissory note, given for the purchase-money of land, is an equitable assignment of the vendor's lien; and an unqualified assignment of a judgment, recovered by the endorsee upon the note, carries with it the same lien.—*Griffin v. Camack*..... 695
25. *Subrogation of surety to vendor's lien*.—If the administrator of an insolvent estate pays in full, with his own individual funds, a note given for the purchase-money of land, on which he was bound as his intestate's surety, he cannot claim to be subrogated, in equity, to the vendor's lien on the land.—*McNeill v. McNeill*..... 169
26. *Jurisdiction of equity to establish and quiet title to right of way*. A court of equity has jurisdiction, at the suit of a purchaser from the devisee, to enforce the specific performance, against a purchaser of the servient lands, of an express grant by devise of a right of way appurtenant, by establishing the right, defining the track, and enjoining the disturbance of the way. *Lide v. Hadley*..... 627
27. *Compensation*.—On decreeing the specific performance of the grant of a right of way, establishing the right, defining the track, and enjoining the disturbance of the way, the court will also order an account of the damages sustained by the complainant from the defendant's denial and disturbances of his right..... 627

II. PLEADINGS AND PRACTICE.

28. *Parties to injunction suit*.—It is improper to make the probate judge a defendant to a bill in chancery, which seeks to enjoin the settlement of an estate pending in his court.—*McNeill v. McNeill* 169
29. *Allegations of bill*.—In a bill to set aside an award, a general charge that the arbitrators "were guilty of fraud, partiality and corruption," without a specification of particulars, is wholly insufficient.—*Willingham v. Harrell*..... 583
30. *Same*.—In a bill to correct errors of law and fact in the final settlement of a guardian's accounts before the probate court, (Code, §§ 2041, 1915-16,) an averment "that said account was stated and filed to suit the embarrassed state of said guard-

CHANCERY—CONTINUED.

- ian," without a specification of the particular errors complained of, is not sufficiently precise and definite.—*Travis v. Frierson*. 729
31. *Offer to do equity*.—In a bill filed by a voluntary purchaser from the mortgagor, seeking to set aside the sale under the mortgage on the ground of fraud, and to be let in to redeem, an averment that the complainant is ready to pay the amount admitted to be due on the mortgage debt, "and hereby tenders that amount, or any other sum that may be found due, and submits herself to this court for its decree in that behalf", is a sufficient tender.—*Cain v. Gimon* 168
32. *Offer of indemnity*.—In a bill filed by the distributees of an intestate's estate, seeking to set aside a purchase of slaves by the administrator, at a sale made by himself under an order of the probate court, an offer of indemnity is not necessary. *Payne v. Turner*..... 623
33. *Affidavit of lost instrument*.—When a party comes into equity to obtain the benefit of an instrument properly belonging to the jurisdiction of a court of law, on the ground that it is lost, an affidavit of its loss must accompany the bill; but this rule does not apply to a bill for the foreclosure of a mortgage, given to secure the payment of a note which is alleged to be lost. *O'Bannon v. Myers' Executors* 551
34. *Amendment of bill*.—A mere inconsistency, or repugnancy between the allegations of the original and amended bills, does not render the allowance of the amendment improper; there must be an inconsistency, or repugnancy, in the purposes of the bill, as contradistinguished from a modification of the relief sought.—*Cain v. Gimon*..... 168
35. *Effect of amendment*.—So far as the equity of the bill is concerned, an amendment takes effect as of the date of the original bill..... 168
36. *Weight of responsive answer*.—A sworn answer, denying a material allegation of the bill, throws on the complainant the *onus* of sustaining his averment by the testimony of two witnesses, or of one witness with corroborating circumstances. *Easterwood v. Linton* 175
37. *Same*.—Where the bill alleges that an original paper, a copy of which is appended as an exhibit to the bill, is in the defendant's possession, and specially interrogates him as to the correctness of the alleged copy, and requires him to point out the differences (if any) between it and the original; and the defendant specifies in his answer two particulars in which the alleged copy differs from the original, and avers that there are other differences which he cannot recollect.—this does not impose upon the complainant the *onus* of proving the correctness of the alleged copy.—*Hartwell v. Whitman*..... 712
38. *Same*.—A statement in an answer, to the effect that "respondent does not admit the statement of moneys paid as charged

CHANCERY--CONTINUED.

- in the bill to be correct, but avers that the aggregate of said payments but little (if any) exceeded the amount of principal and interest due on the first of said notes," does not so negative the payments claimed in the bill as to require the testimony of two witnesses, or of one witness with corroborating circumstances, to overturn it.—*Bobe's Heirs v. Stickney*. 482
39. *Same*.—The recital of a note in a mortgage given to secure it, although it does not estop the mortgagor from denying the existence of the note as recited, is not sufficient to overcome his sworn denial of its existence in his answer to a bill in chancery.—*O'Bannon v. Myers' Ex'rs*. 551
40. *Same*.—The issue in this case being, whether the *feme covert* defendant executed the promissory note which was sought to be charged upon her separate estate, and which purported to be signed by her, jointly with her husband; one witness expressing the opinion that her signature was genuine, while four other witnesses testified, that the handwriting, though closely resembling the defendant's, was not hers; and the evidence showing that, when the note was handed to the husband, and he was required to procure his wife's signature, he went with it towards the room occupied by himself and wife, and returned with her name signed to it,—*held*, that the evidence was not sufficient to overcome the sworn denial of the answer. *Starke v. Blackwell*. 154
41. *Variance*.—There can be no decree in chancery, in favor of the complainant, without a substantial correspondence between his allegations and proof.—*O'Bannon v. Myers' Ex'rs.* 551
42. *Same*.—Under a bill which alleges that a contract for the sale of slaves was a mortgage, and prays for a redemption and account, if the evidence shows that the contract was a conditional sale, there is a fatal variance between the allegations and proof.—*Swift v. Swift*. 147
43. *Same*.—Under a purchaser's bill, seeking a reformation of his vendor's title-bond, by the insertion therein of a parcel of land, which, he alleges, was a part of the tract purchased by him, and was omitted from the bond by the fraud or mistake of his vendor,—if the evidence shows that the said parcel was omitted by mistake, and that another parcel, not constituting a part of the tract sold, was inserted in the bond by mistake in lieu of the omitted parcel, the complainant cannot have a decree.—*Easterwood v. Linton*. 175
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2. *Same.*—The widow's right of dower is governed by the law which was of force at the time of the husband's death, and not by that which was in existence at the time of the marriage, or of the husband's acquisition of the land.—Boyd v. Harrison..... 533
3. *What law governs revocation of will.*—The question whether a will, executed in 1851, is impliedly revoked by a sale and conveyance of the land devised by it in 1856, must be determined by the provisions of the Code of 1853.—Welsh v. Pounders... 668
4. *What law governs validity of contract.*—Where an administrator, on final settlement of his accounts, was sought to be charged with the unpaid balance due on a bond, executed by him to the intestate in his life-time; which bond, though executed in Alabama, and binding the obligor to the payment of eight per cent. interest, was proved to have been given as a substitute for a prior bond, containing similar terms, but executed in South Carolina, and given for the purchase-money of property there bought by the obligor from the intestate,—*held*, that the validity of the contract, as to the interest reserved, was to be determined by the laws of South Carolina.—Broughton's Adm'r v. Boudley 68

CONSTITUTIONAL LAW.

1. *Act of Feb. 24, 1860, loaning two and three per cent. funds to railroad companies, and imposing additional restrictions on loan authorized by former statute.*—The act of February 17, 1854, "to aid the Tennessee and Coosa railroad," (Session Acts 1853-4, p. 280,) having been accepted and acted on by the said railroad company, by the completion of portions of its road, and the letting out of contracts for the completion of the residue within the time required by said act, it was not competent for the legislature, by the subsequent act of February 24, 1860, (Session Acts 1859-60, p. 110,) to impose additional limitations on the loan authorized by the former act; nor can the latter act operate as a revocation of the authority conferred on the governor by the former; consequently, said railroad company is entitled to receive from the public treasury the sums loaned by the former act, on its performance of the conditions therein specified, without a compliance with the additional requisitions of the latter act.—*Tenn. & Coosa Railroad Co. v. Moore*..... 371
2. *Statute authorizing municipal corporation to aid railroad company.* The act of February 8th, 1858, "to authorize the corporate authorities of the city of Mobile to aid in the construction of a railroad, upon a vote of the citizens," (Session Acts 1857-8, p. 165,) and the act supplemental thereto, approved November 29, 1859, (Session Acts 1859-60, p. 294,) are not violative of any constitutional provision; being neither an illegal exercise of the taxing power, nor a taking of private property without just compensation.—*Gibbons v. Mobile & Great Northern Railroad Co.*..... 410
3. *Exemption of public corporation from liability to garnishment.* The exemption of public or municipal corporations from liability to process of garnishment, involves no violation of the 1st section of the 1st article of the constitution, which declares that "no set of men are entitled to exclusive, separate emoluments or privileges, but in consideration of public services."—*Clark & Saunders v. Mobile School Comm'rs.*..... 621
4. *Attorney's right to practice before municipal court.*—Although a quasi-criminal proceeding before the mayor of Mobile, for an alleged violation of a municipal ordinance, is neither a "criminal prosecution," nor a "civil cause," within the meaning of the 10th and 29th sections of the 1st article of the constitution, securing to a party the right "to be heard by himself and counsel;" yet, under section 730 of the Code, construed in harmony with the general spirit and policy of these constitutional provisions, an attorney-at-law who has been regularly licensed by the supreme court, and who has taken the prescribed oath, has a legal right to appear, when employed for that purpose, as counsel for persons who are on trial before

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CONTRACTS.

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2. *What instruments import consideration.*—In an action against a railroad company, on a certificate issued by its engineer for work done by a contractor, (which certificate is alleged to have been signed and issued by the engineer as the authorized agent of the corporation, and to have been transferred by the contractor to plaintiff;) there being no sworn plea, denying the execution of the certificate,—the instrument itself is evidence of the existence of the debt, (Code, §§ 2238, 2278-79,) and that it was made on sufficient consideration—Ala. & Miss. Rivers Railroad Co. v. Sanford & Reid..... 703
3. *Sufficiency of consideration.*—In an action against a railroad company, by the assignee of a certificate issued by its engineer to a contractor for work done on the road, an oral agreement between the contractor and the engineer, to the effect that the certificate should be used in paying a debt due from the contractor to a stockholder, who was indebted to the railroad company, if made after the issue and delivery of the certificate, is without consideration 703
4. *Illegal consideration.*—A contract, whether in form a settlement on a mistress, or a promise to pay money, made upon consideration of future illicit cohabitation between the parties, is void; and, although the law may presume, where the evidence leaves it doubtful whether the consideration was for past or future cohabitation, that the former was the real consideration; yet, where it was shown that "there was evidence conducing to prove that the real consideration was future illicit intercourse," the court may properly refuse a charge asserting that legal proposition, although "there was also evidence tending to prove that there had been prior illicit intercourse between them."—Walker v. Gregory 180
5. *Same.*—Where a party plaintiff cannot make out his case, without the aid of a contract founded on an illegal considera-

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- tion, he is not entitled to recover, although the contract may have been executed on his part; but, where a party is resisting a recovery, the rule may possibly be different..... 180
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7. *Maintenance.*—A contract, by which one of the defendants to a pending chancery suit, having a common interest with the other defendants in resisting the relief sought, purchases from the others their interest in the property in litigation, with “the hires, rents and damages” which may accrue in the suit, and assumes a liability for their share of the costs and expenses of the suit, is not obnoxious to the charge of maintenance.—*Thompson v. Marshall*..... 504
8. *Validity of contract between corporate authorities of Mobile and Great Northern Railroad Company, as affected by failure to comply with terms of act of 1858.*—The act of 1859 having expressly empowered the corporate authorities of Mobile to aid in the construction of the Mobile and Great Northern railroad, by virtue of the vote of the citizens taken under the act of 1858, the failure of said corporate authorities, in taking the vote of the citizens, to comply with the terms of the said act of 1858, does not affect the validity of their contract with said company.—*Gibbons v. Mobile & Great Northern Railroad Company*..... 410
9. *Same, as affected by fact that city bonds, with interest, exceed amount of aid authorized by said act.*—Nor is the validity of said contract affected by the fact, that the aggregate amount of the bonds issued by said corporate authorities, with the interest thereon accruing up to the time when they respectively fall due, exceeds one million of dollars, the sum specified in said act as the maximum of aid to be expended to said railroad company..... 410
10. *Same, as affected by failure to reserve stock for accruing interest on bonds.*—Nor is the validity of said contract at all impaired by the failure to require stock in said railroad company to be issued to the assignee or appointee of the city, for the interest it may pay on said bonds..... 419
11. *Same, as affected by levy of tax for payment of bonds.*—Altho’ the

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- said acts of 1858 and 1859 only authorized said city authorities to aid said railroad company in one of two ways—*i. e.*, either by direct taxation, or by the issue of city bonds, as might be determined by the vote of the citizens—and not in both ways; yet said city authorities were thereby clothed with the implied power, in the event that the citizens voted in favor of the issue of bonds, to levy a special tax to provide for the payment of the bonds, with interest, as they fall due; and this, moreover, was expressly enjoined on them as a duty by the 13th section of the act of 1843. (Session Acts 1842-3, p. 116)..... 410
12. *Same, as affected by failure to comply with provisions of 9th section of said act of 1843.*—The 9th section of said act of 1843, prohibiting said corporate authorities of Mobile from borrowing money, or creating new debts, “for purposes of profit or improvement,” without the unanimous vote of the boards of aldermen and common council, at a full meeting, concurring with the mayor, is expressly reserved from repeal by the act of 1844, “to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same,” (Session Acts 1843-4, p. 191, § 48,) and is not repealed, or in any manner impaired, by said acts of 1858 and 1859, above cited; nor is said section confined in its operation to the powers which said city authorities were then authorized to exercise. But the issue of bonds under the contract with said railroad company is not, within the meaning of said section, the creation of a new debt “for the purpose of profit or improvement;” consequently, the validity of said contract is not affected by the fact that it was not made at a full meeting of both said boards, and with the unanimous vote of all their members..... 410
13. *Same, as affected by 16th section of said act of 1843, prohibiting contracts between said corporate authorities and individual members.*—Since the contract with said railroad company does not require or authorize any member of the board of aldermen or common council to do any work or perform any service for said corporate authorities, the 16th section of said act of 1843, prohibiting contracts for work or service between said corporate authorities and the individuals composing either board, has no application to the case..... 410
14. *Same, as affected by official vote of corporate authorities.*—If said contract be a violation of the official oath, as prescribed by the 7th section of said act of 1844, of those aldermen and common councilmen who were at the time stockholders in said railroad company; yet, since the statute does not declare the prohibited act void, nor impose a penalty for its violation, the contract is nevertheless valid in law..... 410
15. *Same, as affected by public policy.*—The fact that several of the aldermen and common councilmen were, at the time said

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- contract was entered into, stockholders in said railroad company, does not, *per se*, invalidate said contract. 410
16. *Difference between sale and exchange; sale of slave by unlicensed negro-trader.*—The charges of the court to the jury in this case, relative to the difference between a sale and an exchange, and as to the construction of the statute (Code, §§ 399–400) forbidding the sale of a slave by an unlicensed negro-trader, held, on the authority of *Williamson v. Berry*, (8 How. U. S. R. 544,) to contain no error prejudicial to the appellant.—*Clement v. Cureton*. 120
17. *Sale of slaves by unlicensed negro-trader.*—The statute prohibiting a sale of slaves by an unlicensed negro-trader, and declaring such sale void, (Code, §§ 397, 399, 400,) does not prevent a negro-trader, in whose sales-house slaves are exhibited for sale and sold by the owner, from recovering by action the half-commissions to which, by the custom of the trade, he is entitled in such case.—*Dillard v. Scruggs*. 670
18. *Same.*—Neither the 47th sub-division of section 397 of the Code, nor the act of 1856 amendatory thereof, (Sess. Acts 1855–6, p. 25,) prohibits a broker or agent for the sale of slaves from selling a slave belonging to himself, without license.—*Brooks v. Pollard*. 573
19. *Construction of special contract for sawing lumber; performance, and breach.*—Under a contract by which the plaintiff agreed to let the defendants have all the pine timber on his lands that was suitable for good lumber, and the defendants agreed to saw the same into lumber and sell it as soon as they could, to saw no other lumber until it was done, and to pay the plaintiff, annually, in money, one-fifth of the gross proceeds of the lumber sold and collected by them,—neither the dissolution of the partnership in the mill business between the defendants, nor the sale of the mill under a mortgage executed by one to the other of them, discharges them from the further performance of their contract, which is continuous and entire, and which binds them to performance within such time as will suffice for its accomplishment by the use of a reasonable investment and effort.—*Fail & Miles v. McRee*. 61
20. *Contract for sale of manufactured article.*—A contract between the lessor and lessee of certain iron-works, to the effect that “the iron made at the furnace should be W.’s [lessor] as fast as it was made, until he was repaid for his advances in money and the rent due,” is a contract for the sale of the manufactured iron, and not for the work and labor bestowed in the manufacture. *Sawyer v. Ware*. 675
21. *When title passes to purchaser, as against execution creditor of vendor.*—Under a verbal contract for the sale of an article to be manufactured by the vendor, if the contract is within the statute of frauds, the title does not pass to the purchaser until there has been a delivery to him; and if a valid execution against the

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vendor is in the hands of the sheriff during the interval between the manufacture and the delivery of the article, the lien of the execution is superior to the title of the purchaser. 675

CORPORATIONS.

1. *What constitutes public corporation.*—The Mobile school commissioners, as established by the act "to regulate the system of public schools in the county of Mobile," (Session Acts 1853-4, p. 190.) constitute a municipal or public corporation.—*Clark & Saunders v. Mobile School Comm'rs.* 621
2. *Garnishment against.*—A public or municipal corporation is not amenable to the process of garnishment, under the laws of this State; and this exemption involves no violation of the first article of the constitution, which declares that "no set of men are entitled to exclusive, separate emoluments or privileges, but in consideration of public services." 621
3. *Authority of corporation to lend money.*—The charter of the grand lodge of free-masons of Alabama (Toulmin's Digest, 582-3) confers on said corporation no power to lend money.—*Grand Lodge of Alabama v. Waddill.* 313
4. *Power of municipal magistrate, under ordinance, to imprison slave in default of bond for good behavior.*—Under the 15th section of the act of 1844, "to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same," (Session Acts 1843-4, p. 180.) and the ordinance "for the punishment of vagrants and disorderly persons," (Digest of City Charters and Laws of Mobile, 145,) the mayor has no authority or jurisdiction to require a slave to give a bond for his good behavior, or to commit him to jail in default of the execution of such bond.—*Withers v. Coyles.* 320
5. *Construction of municipal ordinance requiring public carriages to be lighted when on duty by night.*—Under the ordinance of the city of Mobile, imposing a fine "on the owner or driver" of a public carriage, hack or cab, for a failure to have the lamps of his vehicle lighted when on duty by night, (Municipal Laws of Mobile, 105, § 86,) it is no defense to the owner, that he was not present, and had no knowledge of the alleged violation of the law by his negro driver.—*Dane v. Mayor of Mobile.* 34
6. *Competency of stockholder as witness for private corporation.*—A stockholder in a railroad company is not a competent witness for the corporation.—*Ala. & Miss. Rivers Railroad Company v. Sanford & Reid.* 708

CRIMINAL LAW.

1. *Change of venue.*—The statute authorizing a change of venue in a criminal case, (Code, § 3608,) applies to and includes slaves.—*Mose v. The State.* 211

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2. *Same*.—The venue having been changed on the prisoner's application, and the cause afterwards re-transferred, by consent, back to the county in which the indictment was found, and the trial there had without objection on the part of the prisoner, he cannot be heard, in the appellate court, to question the validity of the order re-transferring the cause.—*Paris v. The State*..... 232
3. *Arraignment, and service of copy of indictment and venire*.—When the record in a criminal case shows that the prisoner, being brought to the bar in custody, pleaded not guilty, without raising any objection to the preliminary proceedings, and was thereupon tried and convicted, the appellate court will not reverse the judgment of conviction, because the record does not affirmatively show that he was formally arraigned, and served with a copy of the indictment and a list of the jury..... 232
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5. *Objections to grand jury*.—If an indictment is void, because found at a special term, at which the court had no authority to organize a grand jury, the objection may be taken for the first time in the appellate court; but, where the court had such authority, the prisoner cannot (Code, § 3591) take any objection to the indictment, on account of the want of qualifications of any of the grand jurors.—*Harrington v. The State*..... 236
6. *Authority of city court of Mobile at special terms*.—Under the act of 1858, "to repeal an act therein named regulating the sessions of the circuit and city courts of Mobile," (Session Acts 1857-8, p. 57, § 3,) the city court has authority, at a special term, to originate business, to take indictments, and to organize a grand jury..... 236
7. *Presumption in favor of judgment*.—If the validity of an indictment, found at a special term of the city court of Mobile, depended upon the fact that the accused was in custody at the time it was found, and the record did not affirmatively show that he was not then in custody, the appellate court would presume, in favor of the judgment, that he was then in custody..... 236
8. *Sufficiency of indictment*.—It is not necessary that an indictment should show where the session of the court or of the grand jury was held, or that the grand jury was legally called before the court, or that the indictment was returned into court, or that the offense was committed within the period prescribed as a bar by the statute of limitations..... 236
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- culated to produce death, the perpetrator is guilty of manslaughter in the first degree under the statute of this State. (Code, §§ 3084-85.) as he would be guilty of voluntary manslaughter at common law. (A. J. WALKER, C. J., *dissenting*.)—*McManus v. The State*, ... 285
10. *Murder; sufficiency of indictment*.—An indictment for the murder of "—— Butler, whose christian name is to the grand jury unknown," is sufficient under the provisions of the Code.—*Bryant v. The State* 270
11. *Same; relevancy of prisoner's subsequent acts and declarations as evidence*.—Under an indictment for murder, it having been shown that the prisoner and the deceased, while on a drunken frolic, had an altercation together, which resulted in a fight between them; that the prisoner struck the deceased with a brickbat during the fight, and that the latter died from the effects of the blow during the following night,—it is competent for the State to prove, "that about a half-hour after the blow had been given and after the fight was entirely over, and after the parties had left the place where the fight occurred, the prisoner went to the place where the deceased was, with a pistol in his hand, and said he had come to kill the damned old rascal."—*McManus v. The State* 285
12. *Same; admissibility of confessions*.—Where a witness testifies, that he went to see the prisoner, after his arrest, at the instance and request of the latter, and found him confined and chained; that in reply to an inquiry why he had sent for him, the prisoner referred to an informal and summary examination, at which the witness had assisted, admitted that his denial of guilt on that occasion was false, and proceeded to confess his guilt; and that he did not know of any promises or threats previously made to the prisoner.—this is sufficient, *prima facie*, to show that the confessions were voluntary, and to authorize their admission as evidence before the jury.—*Mose v. The State*, ... 211
13. *Same*.—The confessions of the prisoner in this case, who was a slave, held to have been properly received in evidence under the facts disclosed in the record, notwithstanding promises of favor made by his master several weeks previously, and threats of violence by third persons on the day before such confessions were made. 211
14. *Withdrawal of jury pending preliminary investigation by court touching admissibility of confessions*.—There is no rule of law, which requires that, pending the preliminary investigation by the court as to the competency and admissibility of confessions, the jury should be made to withdraw: if a case should arise, in which the ends of justice demanded that such a course should be pursued, an appeal must be made to the enlightened discretion of the presiding judge. 211

CRIMINAL LAW—CONTINUED.

15. *Relevancy of evidence corroborating confessions of prisoner and dying declarations of deceased.*—The fact that a buckshot, of the size admitted by the prisoner to have been used by him in shooting the deceased, was found a month afterwards, lodged in a tree near the scene of the murder, within the range of a gun discharged under the circumstances detailed in the dying declarations of the deceased and in the confessions of the prisoner, is relevant evidence, as corroborating those declarations and confessions 211
16. *Weight of confessions as evidence.*—The *corpus delicti* being otherwise established, a conviction may be had on the prisoner's confessions alone, if free, voluntary, and satisfactorily proved.. 211
17. *Selling liquor to slave.*—Under an indictment for selling liquor to a slave, (Code, § 3283,) the fact that the slave's master gave him money, and sent him into the defendant's house to buy liquor, while he himself waited on the opposite side of the street, for the purpose of ascertaining whether the defendant would unlawfully sell liquor to slaves, constitutes no defense. *Harrington v. The State*..... 236
18. *Same; averment of ownership of slave in indictment.*—Since the husband has a special property in his wife's statutory separate estate, (Code, § 1983,) a slave belonging to her separate estate may be described in such indictment as the property of the husband..... 236
19. *Retailing; selling liquor drunk on or about premises.*—*Held*, on the authority of *Easterling's case*, (30 Ala. 46,) *Downman's case*, (14 Ala. 243,) and *Brown's case*, (31 Ala. 353,) that the court properly refused to instruct the jury, at the request of the defendant, "that if they believed from the evidence that the liquor was drunk in the State of Tennessee," or, "that it was carried upon land belonging to another person, and over which the defendant had no control, and drunk there,"—they must find the defendant not guilty.—*Patterson v. The State*..... 297
20. *Forgery; sufficiency of indictment.*—An indictment which charges the felonious uttering and publishing as true of a forged instrument, knowing the same to be forged, is sufficient, (Code, §§ 3154, 3165, 3501, 3518-19, 3526,) although a conviction might also be had for such uttering and publishing under an indictment charging it as forgery.—*Harrison v. The State*..... 248
21. *Same; plea of former acquittal.*—Under an indictment charging the uttering and publishing as true of a forged instrument, knowing it to be forged, the defendant pleaded a former acquittal, and proved, "that he was heretofore indicted and tried for the forgery of the same instrument with the uttering of which he is charged in the present indictment, and was regularly acquitted upon such trial,—*held*, that presuming this to be all the evidence in the case, there was no error in a charge which

CRIMINAL LAW—CONTINUED.

- instructed the jury, "that a trial for, and acquittal of the forgery of an instrument, was not a bar to a subsequent indictment for uttering the same instrument as genuine, knowing it to be forged."..... 248
22. *Burglary*.—Getting into the chimney of a house, with intent to steal, is a sufficient breaking and entering to constitute burglary, although the party does not enter any of the rooms of the house.—*Donohoo v. The State*..... 281
23. *Adultery ; relevancy of evidence*.—Under an indictment against a married man for living in adultery with an unmarried woman, it having been proved that the defendant frequently visited, by night, the house in which the woman lived, and was seen lying in bed with her in her chamber, proof of the woman's general reputation for a want of chastity is relevant and admissible for the prosecution.—*Blackman v. The State*..... 295
24. *Resisting legal process*.—Under an indictment for resisting the execution of process by a constable, it having been shown that the constable was exercising the duties of that office under color of an election, and that the process in his hands was such as it is the right and duty of constables to execute, the defendant cannot be permitted to prove that, by reason of a taint in his blood, the constable was constitutionally incapacitated to hold any civil office.—*Heath v. The State*..... 273
25. *Obstruction of public road*.—To obstruct a public road by a fence, bar, or other impediment of like kind or description, placed in or upon the road, is made a misdemeanor by statute, (Code, § 1176;) but, where the obstruction is caused by a mill-dam, erected at some distance from the road, whereby the water is backed up and increased at the point where the stream crosses the road, to such a depth as to impede and interfere with travel, this is no violation of the statute, unless *willfully* done.—*Prim v. The State*..... 244
26. *Conviction on testimony of accomplice*.—A conviction cannot be had on the uncorroborated testimony of an accomplice, (Code, § 3600,) though such accomplice was also examined as a witness before the grand jury.—*Bird v. The State*..... 279
27. *Same*.—If a master gives money to his slave, and sends him into a grocery to buy liquor, while he himself waits without to see whether the liquor is furnished to the slave, he cannot be considered as an *accomplice* of the seller, within the meaning of the statute (Code, § 3600) which forbids a conviction on the uncorroborated testimony of an accomplice.—*Harrington v. The State*..... 236
28. *Charge on sufficiency of circumstantial evidence*.—A charge to the jury, instructing them that they could not lawfully convict the prisoner, "if, upon all the evidence, they believed that the probabilities of his guilt were as high as ten thousand to one against his innocence,"—held to have been properly refused,

CRIMINAL LAW—CONTINUED.

- because the record did not show that the evidence was confined to facts wholly inconclusive in their tendency; and the court affirmed. It may be doubted, indeed, whether the charge, in the form in which it was asked, would not, in any case, be more calculated to confuse, than to enlighten the jury..... 236
29. *Charge on sufficiency of evidence.*—A charge to the jury, instructing them that they must find the prisoner not guilty, unless the evidence against him was such as to exclude to a moral certainty every supposition (or hypothesis) but that of his guilt, asserts a correct legal proposition, and ought to be granted at the request of the prisoner.—*Mose v. The State*..... 211
30. *Same.*—But a charge which asserts that he is entitled to an acquittal unless the evidence against him was such as to exclude to a moral certainty every possible hypothesis but that of his guilt, is erroneous..... 211
31. *Charge on weight of evidence as compared with evidence in a previous case.*—Under an indictment charging a man and woman with living together in a lechery, the defendant's counsel requested the evidence was held insufficient to establish the fact of adultery; and asked the court to charge the jury, "that, unless they believed the facts of this case at bar were stronger and more conclusive of guilt than the facts in that case, the defendant ought to be acquitted,"—*held*, that the charge was properly refused.—*Blackman v. The State*..... 295
32. *Charge ignoring proof of venue.*—A charge to the jury, instructing them that, on a hypothetical state of facts, not including proof of the venue, the prisoner "would be guilty as charged," is erroneous, and will work a reversal of the judgment of conviction, although the record shows that it was given "among other charges."—*Henry v. The State*..... 268
- See, also, CORPORATIONS, 4, 5.

CUSTOM.

1. *As to employment of hired slave.*—In an action by the owner, against the sub-bailee of the hirer, to recover damages for the loss of a slave, who was accidentally killed while assisting to raise a gin-house on the defendant's plantation, (the contract of hiring being general in its term,) although it may be competent for the defendant to prove that prudent masters are generally in the habit of employing their own slaves in that service when necessary, he cannot prove a local custom among planters to send their own and their hired slaves to assist their neighbors in raising gin-houses.—*Jones v. Fort*..... 449

DAMAGES.

1. *For breach of special contract.*—Under a contract by which the plaintiff agreed to let the defendants have all the pine timber on

DAMAGES—CONTINUED.

- his lands that was suitable for good lumber, and the defendants agreed to saw the same into lumber and sell it as soon as they could, to saw no other lumber until it was done, and to pay the plaintiff, annually, in money, one-fifth of the gross proceeds of the lumber sold and collected by them,—but one action lies for the defendants' failure and refusal to saw all the timber on the plaintiff's land; in which, although the time of performance may not then have elapsed, he is entitled to recover damages for the continued and prospective failure of performance, to be assessed upon the basis of value at the time of the breach; and the measure of his recovery is the profits which would have accrued to him from the defendants' performance of their contract, to be ascertained by deducting the value of the timber left unsawed from one-fifth the value of the timber which it would have made.—*Fail & Miles v. McRee*..... 61
2. *For breach of warranty of soundness of slave*.—In an action to recover damages for a breach of warranty of the soundness of a slave, the right to recover the reasonable charges of the physicians who have attended the slave, does not depend upon the fact that they have been paid.—*Kelly v. Cunningham*..... 78

DEEDS.

1. *Destruction of deed*.—The destruction of a deed, by or with the consent of the grantee, does not reinvest the grantor with the legal title to the premises conveyed.—(*Gimon v. Davis*..... 589)
2. *Constructive notice of mortgage and unregistered deed*.—The registration of a mortgage is constructive notice only to those who hold under the mortgagor, (correcting *dictum* in *Center v. P. & M. Bank*, 22 Ala. 743;) but, if the mortgagor, having voluntarily destroyed an unregistered deed to himself, and procured the execution of a deed by his vendor to a trustee for his wife, joins with his wife and the trustee in a conveyance to a purchaser, the registration of the mortgage charges the purchaser with constructive notice of such unregistered deed, and he cannot successfully defend an action at law by one claiming under a subsequent purchase at execution sale against the mortgagor.. 589
3. *Validity of deed of trust for benefit of preferred creditors*.—A deed of trust, made by a debtor in failing circumstances, while actions at law were pending against him, and only a few days before the rendition of judgments; conveying his stock of merchandise, store-house and residence, which constituted the bulk of his visible property, to a trustee for the benefit of certain *bona-fide* creditors; authorizing the trustee to sell the goods "at either public auction or private sale, as in his judgment may be best calculated to bring the largest sum of money;" and providing that the proceeds of the sale of the property, after payment in full of the secured debts, together with the costs and

DEEDS—CONTINUED.

charges attending the execution of the trust, should be paid over to the grantor or his order, (which deed was declared by this court, on a former appeal not to be fraudulent and void on its face,)—held not fraudulent in fact, on proof that the trustee sold the goods at retail, and mostly on credit till the end of the current year; that the grantor afterwards paid some of the secured debts with funds not conveyed by the deed; and that he declared a few days after the execution of the deed, but not in the presence of the beneficiaries, that his object in executing it was “to keep the executions out of his house.”—*Stetson & Co. v. Miller* 642

4. *Difference between deed of trust and general assignment.*—A deed of trust, executed by a debtor in failing circumstances, and conveying the bulk of his visible property to a trustee for the benefit of certain preferred creditors, cannot be held a general assignment, (Code, § 1556,) when it appears that the grantor had also notes and accounts due him, of considerable value, not conveyed by the deed.
5. *Deed of gift to woman “and heirs of her body.”*—Under a deed of gift, by which the grantor, after reciting his wish to make permanent provision for an unmarried daughter and her children, conveyed certain slaves to a trustee, “for the sole use of my [his] said daughter Prudence and the heirs of her body forever; but, in case the said Prudence shall die without an heir, then the said negroes, together with their increase, to return to my estate, to be equally divided between her brothers and sisters,”—*held*, that the interest of the daughter, whatever it might be, terminated at her death, and that the children then took the absolute property as remainder-men.—*Williams v. McConico*.... 22
6. *Same.*—A deed of gift, by which slaves are conveyed to a trustee, “for the sole and separate use and benefit, and for the support and maintenance,” of a married woman “and the heirs of her body, free from and uncontrolled by her said husband, and to be in no manner subject to or liable for his debts,” confers upon her the absolute equitable interest in the slaves, and gives her children no estate whatever, either jointly with her, or as remainder-men.—*Young v. Kinnebrew*..... 67
7. *Same.*—A deed of gift, by which slaves and other personal property are conveyed to a trustee, in trust for the separate use and benefit of the grantor’s daughter, then a married woman having children, “and the heirs of her body now begotten and hereafter to be begotten,” free from the control, debts and liabilities of her husband; with a further stipulation, that the trustee should permit the daughter to have the possession and control of such portion of the property “as shall and may be necessary for the welfare and comfort of her and her children,” but should have power, at his discretion, to take the property into his own possession, “and so to employ and manage the same

DEEDS—CONTINUED.

- as shall be to the true interest and benefit of her and her children,"—confers upon the daughter's children, who were living when the deed was executed, an equal and joint interest with their mother, subject to diminution by the subsequent birth of other children.—*Robertson & Pettibone v. Johnston*.... 197
8. *Gift to "children" held not to include grand-children*.—Under a deed of gift by which slaves are conveyed to a trustee, in trust for the sole and separate use of the grantor's married daughter during coverture, and, "upon the dissolution of said marriage," to be conveyed "to the present and future children, the offspring of said marriage, that may be living at the time of the happening of said dissolution of marriage,"—grand-children, whose parent was living at the time the deed was executed, but died before the dissolution of the said marriage, take no interest.—*McGuire v. Westmoreland* 600

DEPOSITIONS.

1. *Objection to responsiveness of answer*.—An objection to a part of a deposition, on the ground that it is not responsive to any interrogatory, cannot be made for the first time during the trial. *Clement v. Cureton*..... 120
2. *Indefinite objection*.—A motion to suppress a deposition, "because the witness did not answer material portions of the 3d, 4th, and 5th cross-interrogatories," is too general and indefinite.—*Howard v. Coleman*..... 721

DETINUE.

1. *Liability of sureties on detinue bond*.—There is no statute in this State, authorizing a summary judgment for costs against the sureties on a detinue bond, jointly with their principal, on his dismissal of the suit.—*Garrett & Brooks v. Fuller*..... 179

DIVORCE.

1. *Proof of adultery*.—To establish the charge of adultery by circumstantial evidence, the circumstances proved must be such as would lead the guarded discretion of a reasonable and just man to the conclusion that the crime had been committed; but the fact that the husband, without justifiable cause, voluntarily abandons his wife's bed within a year after their marriage, lends additional weight to suspicious circumstances against him, and tends to give them an unfavorable construction. Tested by these rules, the evidence in this case is sufficient to prove adultery on the part of the husband.—*Jeter v. Jeter*..... 391
2. *Alimony; how decreed*.—When a decree of divorce *a vinculo matrimonii* is rendered in favor of the wife, the statute (Code, § 1971) authorizes the chancellor to allow her a sum of money in gross by way of permanent alimony..... 391

DIVORCE—CONTINUED.

3. *Amount of alimony.*—In determining the amount of permanent alimony to be allowed to the wife, when a divorce is granted to her on account of the husband's adultery, her own conduct is a proper matter for consideration, (Code, § 1972;) but the mere fact that, after her abandonment by her husband, she spoke of him and of her former engagement to be married to another man in an indiscreet and improper manner, does not justify the denial of a liberal allowance to her 391
4. *Same.*—An allowance of \$20,000 to the wife, as permanent alimony, where the value of the husband's estate is between \$40,000 and \$50,000, would, ordinarily, be excessive; but, under the special circumstances of this case—it appearing that the husband had only two children, the elder of whom was a man thirty years old, for whom he had already made liberal provision, while he disowned the younger, who was the only child of the complainant—is not unreasonable..... 391
5. *Estimate of wife's statutory separate estate in determining amount of permanent alimony.*—After the delivery of the opinion in this case, affirming the chancellor's decree on the merits, but remanding the cause, in order that a reference to the master might be made to ascertain the amount of compensation to be allowed to the complainant's solicitors, the parties compromised the matters in controversy between them; and after the full execution of the agreement, by which the appellant obtained some advantages to which he was not entitled under the decree, his counsel having called the attention of the court to the fact, not before noticed, that the wife was shown by the record to possess a statutory separate estate, the value of which did not appear to have been shown in any manner to the chancellor, or to have been estimated by him in determining the amount of her permanent alimony,—*held*, that the decision in the cause, under these circumstances, should not be considered as settling the rule, that an allowance out of the husband's estate, as permanent alimony to the wife, can be sustained on appeal, where the wife has a statutory separate estate, unless it appears that the value of that estate was shown to the chancellor, either by the evidence in the cause, or by the report of the master under a reference. (A. J. WALKER, C. J., *dissenting*, held, that in view of the great disparity between the estates of the parties, as disclosed by the record, the appellate court should take judicial notice of the fact that the wife's separate estate was not sufficient for her maintenance.)..... 391
6. *Alimony pendente lite.*—An order for the allowance of temporary alimony, though usually made at an early stage of the cause, and on a reference to the master, may be made on the final hearing, without an order of reference; the allowance is not restricted to a sum sufficient to provide for the wife the mere necessities of life, but depends on the circumstances

DIVORCE—CONTINUED.

- and social position of the parties; and the decision of the chancellor will not be reversed by the appellate court, unless the record presents a strong and plain case of error..... 391
7. *Allowance of solicitors' fees.*—An allowance for the fees of the wife's solicitors must be restricted to the actual reasonable value of their services, and should not be made without a reference to the master, or proof as to the proper amount..... 391

DOWER.

1. *What law governs right of dower.*—Authorities cited on the question, whether the widow's right of dower is governed by the law which was of force at the time of the husband's death, or by that which was in existence at the time of the marriage and acquisition of the land.—*Harrison v. Boyd*..... 203
2. *Same.*—The widow's right of dower is governed by the law which was of force at the time of the husband's death, and not by that which was in existence at the time of the marriage, or of the husband's acquisition of the land.—*Boyd v. Harrison*..... 533
3. *When widow is entitled to dower.*—Under the Code, (§ 1354,) the widow is not entitled to dower in lands which were purchased by her husband at an administrator's sale, but of which he never received any conveyance, not having made full payment of the purchase-money at the time of his death.... 203, 533
4. *When widow is entitled to rents of dwelling-house.*—The widow's statutory right to retain possession of the dwelling-house in which her husband most usually resided next before his death, with the adjacent plantation, (Code, §§ 1259, 1354, 1367,) and her consequent right to recover the rents thereof, attach only to the premises of which she is dowable..... 203

ENTRY AND DETAINER—FORCEFUL AND UNLAWFUL.

1. *Variance between summons and complaint.*—In an action of forcible entry and detainer, removed by appeal from a justice's court into the circuit court, (Code, § 2864,) the cause being triable *de novo*, the complaint should not be rejected, on account of a variance between it and the cause of action endorsed on the summons issued by the justice.—*Van Aspen v. Townsend*..... 582

ERROR AND APPEAL.

I. WHEN APPEAL LIES.

1. *From decision on petition for hab. corp.*—An appeal does not lie to the supreme court, from the decision of a probate judge on a petition for *habeas corpus*.—(Code, §§ 3016, 3710-17.)—*Guilford v. Hicks*..... 95

ERROR AND APPEAL—CONTINUED.

2. *From order for mandamus*.—An appeal lies to the supreme court, from an order of the circuit court granting a *mandamus* against the mayor of a city.—*Withers v. The State*..... 252

II. PRACTICE.

3. *Amendment of judgment pending appeal*.—When a judgment is amended *nunc pro tunc* during the pendency of an appeal, and the amendment brought up on *certiorari* previously sued out, the amended judgment is properly before the appellate court. *Dow v. Whitman & Ousley*..... 604
4. *What is revisable*.—In civil causes, the appellate court will not notice any assignment of error which is not insisted on in the argument of the appellant's counsel.—*Howard v. Coleman*..... 721
5. *Same*.—On appeal from a decree in chancery, dissolving an injunction on the denials of the answer, without passing on the equity of the bill, the appellate court will only consider the single question decided by the chancellor.—*McLaughlin v. McLaughlin*..... 145
6. *Same*.—On appeal by the complainants from a final decree in chancery in their favor, assigning as error the rules adopted by the chancellor for the statement of the accounts between the parties, the appellate court will not, at the instance of the appellees, consider the equity of the bill.—*Bobé's Heirs v. Stickney*..... 482
7. *Same*.—On appeal from a final decree in chancery, granting to the wife a divorce *a vinculo matrimonii*, and ordering the husband to pay her a specified sum as temporary alimony, and an additional sum to her solicitors as compensation for their services, the order for the payment of the solicitors' fees is revisable; but, on the question whether the order for the payment of temporary alimony is revisable, the majority of the court express no opinion. (A. J. WALKER, C. J., *dissenting*, held that neither portion of the order for the payment of money was revisable.)—*Jeter v. Jeter*..... 391
8. *Conclusiveness of judicial decision*.—A decision of the supreme court is the law of the case in which it is pronounced, and its correctness cannot be questioned on a second appeal.—*Roundtree v. Turner*..... 555
9. *Same*.—After a judgment of the probate court has been twice reversed on error, and the cause remanded for further proceedings, the appellate court will not, on a third appeal, consider the question whether the probate court had jurisdiction of the proceeding; that question having been implicitly involved in the former decision, although the point was not then directly made.—*Mims v. Sturdevant*..... 636
10. *Same*.—Under a bill filed by a creditor, against the personal representative and several legatees of his deceased debtor, seeking satisfaction of his debt out of the property in the

ERROR AND APPEAL—CONTINUED.

- hands of the legatees, the guardian *ad litem* of the infant legatees put in a formal answer, denying all the allegations of the bill; one of which allegations was, that the testator was indebted to the complainant. The only evidence of indebtedness adduced by the complainant was a judgment against the testator's executor, rendered after the executor's assent to the defendants' legacies. On writ of error from the chancellor's decree, one of the assignments of error by the defendants was, the rendition of a final decree for the complainant without any proof of the testator's indebtedness to him. In the opinion of the supreme court it was said, "The debt against the testator is well established." *Held*, on a second appeal by the defendants, after the infants had attained their majority, and had put in an answer requiring proof of the testator's indebtedness to the complainant, that this opinion precluded inquiry into the legal question, whether a judgment against the executor, rendered after his assent to the defendants' legacies, was, as against them, evidence of the testator's indebtedness to the complainant.—*Sanders v. Godley's Adm'r*..... 50
11. *Error without injury*.—The correctness of a charge to the jury, which, however erroneous, could not have prejudiced the appellant, will not be revised, at his instance, by the appellate court.—*Williams & Smart v. Carpenter & Co*..... 9
12. *Same*.—Where the defendant's title is affirmatively shown to have been wholly insufficient to overturn the plaintiff's *prima-facie* case, the appellate court will not, at his instance, inquire into the correctness of any of the rulings of the primary court adverse to him.—*McTyer v. McDowell*..... 39
13. *Same*.—The admission of evidence, which, though illegal, is simply redundant or superfluous, is, at most, error without injury.—*Bishop v. Blair*..... 80
14. *Same*.—The admission of evidence to prove a fact which is admitted by the pleadings, is, at most, error without injury. *Ala. & Miss. Rivers Railroad Co. v. Sanford & Reid*..... 703
15. *Same*.—The admission of irrelevant evidence, in rebuttal of irrelevant evidence, is, at most, error without injury.—*Watson v. Tool & Nicholson*..... 13
16. *Same*.—The wrongful sustaining of a demurrer to a special plea, when the defendant might have had the benefit of the same defense under his other pleas, is, at most, error without injury.—*Fowell v. Asten*..... 140
17. *Same*.—The appellate court will not inquire into the legality of a question propounded to a witness, when the answer thereto elicited no illegal evidence.—*Clement v. Cureton*..... 120
18. *Same*.—The admission of legal evidence, for an illegal purpose, is not a reversible error: it is the duty of the party to limit its effect by asking an appropriate charge to the jury. *Robinson's Adm'rs v. Allison*..... 525

ERROR AND APPEAL—CONTINUED.

19. *Practice on error in appeal or certiorari cases.*—In appeal and *certiorari* cases, which, when the amount in controversy is less than \$20, are tried by the court without the intervention of a jury, (Code, § 2369,) the judgment of the circuit court will not be reversed on error, unless its decision on the facts is shown to be manifestly wrong.—*Dane v. Mayor of Mobile*... 304
20. *Presumption in favor of regularity of pleadings.*—When a demurrer has been sustained by the primary court, the appellate court will presume, unless the record affirmatively shows the contrary, that the causes of demurrer were specified, as required by the statute.—*Newsom v. Huey*..... 37
21. *Presumption in favor of judgment.*—Where the rulings and judgment of the circuit court can be sustained under the provisions of the Code, but not under the former law, the appellate court will presume, unless the record repels such presumption, that the facts of the case brought it within the provisions of the Code.—*Harrison v. Boyd*..... 203
22. *Same.*—On appeal from a judgment of the circuit court, reversing a decree of the probate court,—by which decree an administrator was charged with interest on the money in his hands, although he made the statutory affidavit, (Code, § 1813;) if the record does not show, by bill of exceptions or otherwise, the evidence which was before the probate court, the appellate court will presume that the evidence justified its decision. *Roundtree & Kirby v. Snodgrass*..... 185
23. *Same.*—In a case which was tried before a probate judge without the intervention of a jury, the appellate court will presume, unless the contrary is affirmatively shown, that his decision was justified by the evidence.—*Guilford v. Hicks* .. 95
24. *Same.*—If the validity of an indictment, found at a special term of the city court of Mobile, depended upon the fact that the accused was in custody at the time it was found, and the record did not affirmatively show that he was not then in custody, the appellate court would presume, in favor of the judgment, that he was then in custody.—*Harrington v. The State*..... 236

III. JUDGMENT.

25. *Judgment reversed in part, and rendered.*—A judgment for costs against the sureties on a detinue bond, jointly with their principal, will be reversed on error as to the sureties, and affirmed as to their principal.—*Garrott & Brooks v. Fuller*..... 179
26. *Remandment of cause on reversal.*—On the reversal of a judgment of the circuit court, rendered on demurrer to evidence, or on an agreed state of facts, the cause will be remanded. *Tenn. and Coosa Railroad Co. v. Moore*..... 372
27. *Decree affirmed in part, and reversed and remanded in part.* The decree of the chancellor in this case, granting a divorce

ERROR AND APPEAL—CONTINUED.

to the wife, was reversed, and the cause remanded, as to the order making an allowance to the wife for her solicitors' fees, but was affirmed in every other respect; and the costs of the appeal were imposed on the appellant.—*Jeter v. Jeter*..... 391

28. *Judgment reversed and rendered*.—On appeal from a judgment against a garnishee, in a case removed from a justice's court by *certiorari*, an error in the amount of the judgment, which might have been corrected on motion in the circuit court, will be corrected by the appellate court, at the costs of the appellant.—*Gould v. Meyer*..... 565

ESTATES OF DECEDENTS.

1. *Jurisdiction of probate court to sell real estate*.—The probate court has no jurisdiction to order the sale of lands, for the purpose of division among a decedent's heirs-at-law or devisees, when the decedent had, at the time of his death, no title whatever to the land, either legal or equitable.—*Bishop v. Blair*..... 80
 2. *Presentation of claim*.—In an action against executors, on a decree rendered against their testator in his life-time, (the statute of non-claim being pleaded,) a witness for plaintiff testified, that the defendants were informed of the nature and amount of the demand, and frequently admitted, within eighteen months after the grant of letters testamentary, "that the plaintiff was claiming said decree of said estate, but said they expected to be able to prove it had been paid;" and that on a partial settlement with the probate court, made within eighteen months after the grant of their letters, they reserved money to pay said decree, provided they should be compelled to pay it,—*held*, that this evidence, if believed by the jury, might justify them in finding that the claim was duly presented to the executors.—*Frazier's Executors v. Praytor*..... 691
- See, also, CHANCERY, 7-9.

ESTOPPEL.

1. *Estoppel en pais*.—An estoppel resting in parol can have no effect, at law, upon the title to land.—*Gimon v. Davis*..... 589
2. *Estoppel by record*.—In proceedings before the probate court, on the petition of a widow, for the allotment of her dower, the mere fact that the husband's administrator is named as a defendant in the marginal statement of the parties' names, and a decree for costs rendered against him, is not sufficient to show that he was a party; consequently, the record is not admissible evidence against him, in a subsequent action by the widow for the recovery of rents, and does not estop him from denying the husband's seizin of the lands.—*Harrison v. Boyd*..... 533

ESTOPPEL—CONTINUED.

3. *By record, and by acts en pais*.—A decree of sale by the probate court, for the purpose of division among heirs or devisees, does not operate an estoppel against a party thereto, when the proceedings are void for want of jurisdiction in the court; nor is the party estopped, at law, from disputing the title of the purchaser, by the fact that he stood by and permitted the sale, without objection, afterwards refused to let the purchaser surrender his purchase, received a part of the purchase-money in distribution, and subsequently bought from the purchaser a right of way over the land.—*Bishop v. Blair*..... 80
4. *Against tenant from denying landlord's title*.—An order of the commissioners' court, granting to the defendant a private right of way through the plaintiff's lands, does not estop the defendant, when sued for the commission of a trespass on lands outside the track of the private road, from disputing the plaintiff's title to the land..... 80
5. *Same*.—The acceptance of a lease from a stranger, by a party who is in possession of land, if done "in ignorance of his rights," does not estop him from afterwards impeaching the validity of such stranger's title.—*Cain v. Gimon*..... 168
6. *Estoppel against administrator from denying intestate's seizin*.—In an action by the widow, against the husband's administrator, to recover the rents of the dwelling-house in which the husband most usually resided next before his death, (Code, § 1359,) the defendant is not estopped from denying that his intestate had such title to the premises as is necessary to support the action.—*Harrison v. Boyd*..... 533

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence rebutting fraud in execution of conveyance*. In trespass against a sheriff, for levying an attachment on a stock of goods claimed by the plaintiffs under a conveyance from the defendant in attachment, which conveyance is impeached for fraud by the defendant; the defendant having proved that, about the time of the execution of the conveyance for the stock of goods, the debtor also conveyed all his other property to the plaintiffs, taking their notes for the purchase-money, and having produced other evidence of fraud in the execution of the conveyances, it is competent for the plaintiffs, in rebuttal, to prove that the proceeds of these notes were used by him in payment of pre-existing *bona-fide* debts, and that the plaintiffs had paid the debts which, by their contract with him, they had bound themselves to pay; and the fact that these payments were made after the levy of the attachment, and after the institution of the suit, does not affect the admissibility of the evidence.—*Watson v. Tool & Nicholson*.....

EVIDENCE—CONTINUED.

2. *Relevancy of evidence to prove performance.*—In an action to recover damages for a breach of one of the stipulations of a contract, evidence showing the defendant's performance of another distinct stipulation is irrelevant.—*Fail & Miles v. McRee*..... 61
3. *Relevancy of evidence distinguished from sufficiency.*—In trespass *quare clausum fregit*, the evidence of a witness who testifies to a trespass committed by defendant on lands belonging to plaintiff, but cannot identify those lands as the lands described in the complaint, cannot be excluded from the jury on motion.—*Pike v. Elliott*..... 69
4. *Murder; relevancy of prisoner's subsequent acts and declarations as evidence.*—Under an indictment for murder, it having been shown that the prisoner and the deceased, while on a drunken frolic, had an altercation together, which resulted in a fight between them; that the prisoner struck the deceased with a brick-bat during the fight, and that the latter died from the effects of the blow during the following night,—it is competent for the State to prove, "that about a half-hour after the blow had been given, and after the fight was entirely over, and after the parties had left the place where the fight occurred, the prisoner went to the place where the deceased was, with a pistol in his hand, and said he had come to kill the damned old rascal."—*McManus v. The State*..... 285
5. *Relevancy of evidence corroborating confessions of prisoner and dying declarations of deceased.*—The fact that a buckshot, of the size admitted by the prisoner to have been used by him in shooting the deceased, was found a month afterwards, lodged in a tree near the scene of the murder, within the range of a gun discharged under the circumstances detailed in the dying declarations of the deceased and in the confessions of the prisoner, is relevant evidence, as corroborating those declarations and confessions.—*Mose v. The State*..... 211
6. *Relevancy of evidence to prove adultery.*—Under an indictment against a married man for living in adultery with an unmarried woman, it having been proved that the defendant frequently visited, by night, the house in which the woman lived, and was seen lying in bed with her in her chamber, proof of the woman's general reputation for a want of chastity is relevant and admissible for the prosecution.—*Blackman v. The State*..... 295
7. *Admissibility of evidence rebutting negligence.*—Under a count in trover, to recover damages for the loss of a slave, who was accidentally killed while employed in raising a gin-house for the defendant; the plaintiff having adduced evidence, tending to show that, on account of the weather and the condition of the timbers, it was imprudent to attempt the work on that day, it is competent for the defendant to prove, in rebuttal,

EVIDENCE—CONTINUED.

- that the work was undertaken after consultation among the persons present as to the propriety and safety of so doing.
Jones v. Fort..... 449
8. *Same*.—In an action by the owner, against the hirer of a slave, to recover damages for the defendant's negligence and want of care in failing to furnish proper medical attendance to the slave while sick; it having been proved that, by the terms of the contract of hiring, plaintiff's agent, by whom the contract was made, assumed to pay for necessary medical services during the term, and had authority to make such contract,—evidence showing that the defendant informed the agent of the slave's sickness, and requested him to call in a physician, and that the agent refused to do so, and declared himself satisfied with the defendant's personal attendance on the slave, is relevant and admissible for the defendant.—*Howard v. Coleman*. 721
9. *Same*.—In such action, the plaintiff having proved that the slave died of an infectious disease, contracted at the defendant's house during the term; and having introduced evidence tending to show that the defendant was unnecessarily absent from home during the slave's sickness, and neglected to give him proper care and attention while sick,—it is competent for the defendant to prove, in rebuttal, that the business in which he was engaged required his absence from home; that the nature of his business was known to the plaintiff when the contract of hiring was made, and that he contracted the disease of which the slave died while thus absent from home on business..... 721
10. *Proof of unsoundness of mind*.—The fact that a person makes one or more improvident bargains, or is generally unthrifty or unsuccessful in his business, does not, *per se*, prove him to be *non compos mentis*; but it is admissible evidence, in connection with facts and circumstances tending to show mental unsoundness.—*In re Carmichael*..... 514
11. *Same*.—On the trial of an inquisition of lunacy, a witness cannot be asked, "whether his brother did not control the defendant and his business;" nor, "whether he is not going down hill generally;" nor, "whether his appearance was that of a man of sound or unsound mind."..... 514
12. *Rebutting evidence of indebtedness outside of demand sued on*. Defendants having adduced evidence, under the plea of payment, showing sundry payments made by their intestate to plaintiff during the period covered by the account sued on; and there being no evidence that the intestate had directed the application of these payments to any particular debt, or that plaintiff had made any application,—it is competent for the plaintiff to prove, in rebuttal, that the intestate owed him other debts, to which these payments might be applied by himself or the court.—*Robinson v. Allison*..... 525

EVIDENCE—CONTINUED.

13. *Admissibility of evidence under bill of particulars.*—In an action on an account for work and labor done, plaintiff's bill of particulars (Code, § 2233) containing an item for "work done on granary;" and the evidence showing that the granary had a shed on each side, one of which contained a threshing-machine, "the machinery consisting of a shaft and cog-wheels to move it, which were made fast to the building, like the running-gear of a gin," and which were put up by plaintiff at the same time with the granary,—*held*, that under the liberal rules which govern the construction of bills of particulars, and in the absence of a special showing that the evidence operated a surprise, there was no error in the admission of evidence showing the work performed by plaintiff in putting up said machinery, and the value thereof. 525
14. *Relevancy of evidence on question of title to slave.*—On the trial of an issue between an executor and some of the legatees under the will, the issue being whether the slave in controversy belonged to the executor individually or to the testator, the fact that the testator "was not in the habit of buying property without first seeing it," is relevant and admissible for the executor.—*Mims v. Sturdevant*. 636
15. *Same.*—In such case, the legatees having proved that the slave was employed on the testator's premises, the executor may prove, in rebuttal, that he permitted his slaves to work on the testator's premises. 636
16. *Admissibility of decision of presiding judge on former trial.*—On the trial of an issue before the probate court, the opinion and decision of the presiding judge on a former trial is not admissible evidence. 636
17. *Irrelevant evidence in rebuttal.*—The admission of irrelevant evidence, in rebuttal of irrelevant evidence, is, at most, error without injury.—*Watson v. Tool & Nicholson*. 13
18. *Redundant evidence.*—The admission of evidence, which, though illegal, is simply redundant or superfluous, is, at most, error without injury.—*Bishop v. Blair*. 80
19. *Same.*—The admission of evidence to prove a fact which is admitted by the pleadings, is, at most, error without injury. *Ala. & Miss. Rivers Railroad Co. v. Sanford & Reid*. 703

II. ADMISSIONS; DECLARATIONS; HEARSAY; RES GESTÆ.

20. *Admissibility of confessions.*—Where a witness testifies, that he went to see the prisoner, after his arrest, at the instance and request of the latter, and found him confined and chained; that in reply to an inquiry why he had sent for him, the prisoner referred to an informal preliminary examination, at which the witness had assisted, admitted that his denial of guilt on that occasion was false, and proceeded to confess his guilt; and

EVIDENCE—CONTINUED.

- that he did not know of any promises or threats previously made to the prisoner,—this is sufficient, *prima facie*, to show that the confessions were voluntary, and to authorize their admission as evidence before the jury.—*Mose v. The State*. 211
21. *Same*.—The confessions of the prisoner in this case, who was a slave, held to have been properly received in evidence under the facts disclosed in the record, notwithstanding promises of favor made by his master several weeks previously, and threats of violence by third persons on the day before such confessions were made. 211
22. *Admissibility of party's own declarations*.—The declarations of a party, not constituting a part of the *res gesta*, are not competent evidence in his favor.—*Pike v. Elliott*. 69
23. *Admissibility of declarations of sick slave*.—The declarations of a slave whose soundness is in controversy, made to a person who was not a physician, to the effect "that he had the dropsy, that it was an old disease, and had been on him a long time," are not competent evidence.—*Kelly v. Cunningham*. 73
24. *Whole conversation admissible, when part has been proved*.—When a part of a conversation has been proved by one party, the other has a right to call for all that was said at the time relating to the same subject-matter.—*Jones v. Fort*. 449
25. *Admissibility of hearsay to prove marriage*.—In a statutory action for the use of the wife of a person who has bet and lost money on a horse-race, (Code, § 1563,) general reputation cannot be received, to prove that the beneficiary of the suit is the wife of the loser.—*Davis v. Orme*. 540
26. *Admissibility of evidence of absent witness on former trial*.—The permanent absence of a witness from the State authorizes the admission of his testimony as given on a former trial of the cause.—*Mims v. Sturdevant*. 636
27. *Admissibility of husband's declarations as evidence against wife*. In such action, the declarations of the husband, made after the bet was concluded, but before the race was run, to the effect that he had no interest in the wager, are competent evidence against the plaintiff. 540
28. *Admissibility of declarations qualifying and explaining receipt of money*.—The declarations of a party, made at the time of receiving money, are admissible evidence for him, for the purpose of showing that he did not receive the money as a payment in full of all demands.—*Dillard v. Scruggs*. 670

III. BURDEN; WEIGHT, AND SUFFICIENCY.

29. *Burden of proof; failure of consideration of note*.—In an action on an unconditional promissory note, given for professional services to be rendered by the payee as an attorney-at-law, and payable on a day certain, the *onus* is not on the plaintiff to

EVIDENCE—CONTINUED.

- prove performance of the stipulated services, but on the defendant to show a failure of performance; and proof of the fact that the attorney was absent at the first ensuing term of the court in which the cause was pending, and that the cause was compromised by the parties before the next term, without more, does not even tend to establish a failure of consideration.—*Douglass v. Eason*..... 687
30. *Proof of execution of written instrument on which suit is founded.*
In an action against a railroad company, on a certificate issued by its engineer for work done by a contractor, (which certificate is alleged to have been signed and issued by the engineer as the authorized agent of the corporation, and to have been transferred by the contractor to plaintiff;) there being no sworn plea, denying the execution of the certificate,—the instrument itself is evidence of the existence of the debt, (Code, §§ 2238, 2278–79,) and that it was made on sufficient consideration.—*Ala. & Miss. Rivers Railroad Co. v. Sanford & Reid*..... 703
31. *Proof of ownership of demand.*—If the action is brought by an assignee of the certificate, and there is no sworn plea denying the assignment, proof thereof is not required of the plaintiff..... 703
32. *Proof of execution of note.*—The issue in this case being, whether the *feme covert* defendant executed the promissory note which was sought to be charged upon her separate estate, and which purported to be signed by her, jointly with her husband: one witness expressing the opinion that her signature was genuine, while four other witnesses testified, that the handwriting, though closely resembling the defendant's, was not hers; and the evidence showing that, when the note was handed to the husband, and he was required to procure his wife's signature, he went with it towards the room occupied by himself and wife, and returned with her name signed to it,—*held*, that the evidence was not sufficient to overcome the sworn denial of the answer.—*Starke v. Blackwell*..... 154
33. *Proof of note by recitals of mortgage.*—The recital of a note in a mortgage given to secure it, although it does not estop the mortgagor from denying the existence of the note as recited, is not sufficient to overcome his sworn denial of its existence in his answer to a bill in chancery.—*O'Bannon v. Myers' Executors*..... 551
34. *Weight of confessions as evidence.*—The *corpus delicti* being otherwise established, a conviction may be had on the prisoner's confessions alone, if free, voluntary, and satisfactorily proved.. 211
25. *Charge on sufficiency of evidence.*—A charge to the jury, instructing them that they must find the prisoner not guilty, unless the evidence against him was such as to exclude to a

EVIDENCE—CONTINUED.

- moral certainty every supposition (or hypothesis) but that of his guilt," asserts a correct legal proposition, and ought to be given at the request of the prisoner.—*Mose v. The State*..... 211
36. *Same*.—But a charge which asserts that he is entitled to an acquittal, "unless the evidence against him was such as to exclude to a moral certainty every possible hypothesis but that of his guilt," is erroneous..... 211
37. *Charge on sufficiency of circumstantial evidence*.—A charge to the jury, instructing them that they could not lawfully convict the prisoner, "if, upon all the evidence, they believed that the probabilities of his guilt were as high as ten thousand to one against his innocence,"—held to have been properly refused, because the record did not show that the evidence was confined to facts wholly inconclusive in their tendency; and the court added, "It may be doubted, indeed, whether the charge, in the form in which it was asked, would not, in any case, be more calculated to confuse, than to enlighten the jury..... 236
38. *Charge on weight of evidence as compared with evidence in reported case*.—Under an indictment charging a man and woman with living together in adultery, the defendant's counsel read to the jury the reported case of *Mosser v. Mosser*, (29 Ala. 313), in which the evidence was held insufficient to establish the fact of adultery; and asked the court to charge the jury, "that, unless they believed the facts of the case at bar were stronger and more conclusive of guilt than the facts in that case, the defendant ought to be acquitted,"—held, that the charge was properly refused.—*Blackman v. The State*..... 295

IV. OBJECTIONS.

39. *General objection*.—A general objection to evidence, a part of which is admissible, may be overruled entirely.—*Newsom v. Huey*..... 37
40. *Mode of objecting to evidence admissible against one defendant only*.—When two persons are jointly indicted and tried, and evidence is offered which is admissible against one of them only, if the other wishes to avoid its effect as evidence against him, he must ask an instruction to the jury limiting its effect, instead of moving to exclude it altogether.—*Blackman v. The State*..... 295

V. OPINION; LEGAL CONCLUSION.

41. *Opinion of physician*.—A practicing physician, who states that, "having been requested to examine the defendant, in order to test the condition of his mind, he met and conversed with him, and noticed his general expression and appearance, but had formed no settled opinion as to the depth of his mind," may be asked whether he discovered any evidence of

EVIDENCE—CONTINUED.

- unsoundness of mind, and may state his opinion on the question of sanity *vel non*.—*In re Carmichael*..... 514
42. *Opinion of witness on question of sanity*.—On the question of sanity *vel non*, a witness who, though not a physician, has had an intimate acquaintance with the party, may give his opinion, in connection with the facts on which it is based; *secus*, as to one who has had a mere passing acquaintance, or brief and occasional interviews on general or indifferent subjects..... 514
43. *To what witness may testify*.—A witness cannot be asked, on the trial of an inquisition of lunacy, “whether, in his opinion, the defendant was capable of taking care of himself and managing his affairs.”—*In re Carmichael*..... 616
44. *Same*. Nor can he be allowed to state “the impression that the defendant made on his mind.”..... 514
45. *Same*.—A witness cannot be asked to state *why* another person did a particular act.—*Clement v. Cureton*..... 120

VI. PAROL AND WRITTEN.

46. *Admissibility of parol evidence, in aid of recognizance*.—*In sci. fa.* against bail, on a forfeited recognizance, the *capias* and bail-bond may be connected with the pending indictment to which they relate, by the parol testimony of the sheriff and clerk, notwithstanding a variance in the description of the offense. *Welch v. The State*..... 277
47. *Same, in aid of record to identify pending cause*.—On motion to strike from the trial docket a case in which a new trial had been granted at the last preceding term, the marginal statement of the parties’ names, both in the entry of the motion on the motion docket, and in the entry of the order on the minutes, being erroneous, parol evidence is admissible to identify the case and correct the mistake.—*Ex parte Nall*..... 299
48. *Same, to vary writing*.—In an action against a railroad company, by the assignee of a certificate issued by its engineer to a contractor for work done on the road, proof of an oral agreement between the contractor and the engineer, to the effect that the certificate should be used in paying a debt due from the contractor to a stockholder, who was indebted to the railroad company, is not admissible for the defendant; because, if made before the issue and delivery of the certificate, and as an inducement to its issue, its effect is to vary the terms of the certificate.—*Ala. & Miss. Rivers Railroad Co. v. Sanford & Reid*..... 703
49. *Same, to complete defective memorandum of sale under statute of frauds*.—Parol evidence cannot be received to complete a defective memorandum of sale by an auctioneer, so as to avoid the effect of the statute of frauds.—*Knox v. King*..... 367

EVIDENCE—CONTINUED.

VII. PARTIES.

50. *Proof of demand by plaintiff's own oath.*—Where the plaintiff proposes to establish his demand by his own oath, (Code, § 2313,) and swears positively to its correctness, the defendant's sworn denial of the facts, "upon the best of his knowledge and belief," is not sufficient to exclude the plaintiff's statement as evidence.—*Fitzpatrick v. Hays*..... 684

VIII. PRIMARY AND SECONDARY.

51. *Predicate for introduction of secondary evidence.*—Secondary evidence of the contents of a vendor's title-bond, and of his several receipts for partial payments made by the purchaser, is admissible, on proof that said papers were last seen, after the purchaser's application for the benefit of the bankrupt act of 1841, on file with his other papers in the office of the assignee in bankruptcy; that said assignee afterwards absconded, and was removed from office, having never turned over to his successor the books and papers belonging to his office; and that the succeeding assignee, after diligent search in his office, could not find them, and could obtain no information concerning them from his predecessor, to whom he made several applications by letter.—*Bohe's Heirs v. Stickney* 482

IX. RECORDS AND JUDGMENTS.

52. *Admissibility of record as evidence.*—In detinue for slaves, by persons claiming as remainder-men under a deed of gift, against the representative of the husband of the first taker, a transcript from the records of the circuit court of the county in which the deed was recorded, showing the resignation of the trustee appointed by the deed, with the consent of the grantor and beneficiary, and the appointment of another trustee in his stead, is not admissible evidence for the plaintiffs, in connection with the proof of the death of the substituted trustee, to show that there is no legal title outstanding against them, when the identity of the names of the parties is the only evidence connecting the record with the slaves and deed in controversy, and it appears that the death of the trustee did not invest the plaintiffs with the legal title to the slaves.—*Williams v. McConico*..... 22
53. *Same.*—In proceedings before the probate court, on the petition of a widow, for the allotment of her dower, the mere fact that the husband's administrator is named as a defendant in the marginal statement of the parties' names, and a decree for costs rendered against him, is not sufficient to show that he was a party; consequently, the record is not admissible evidence against him, in a subsequent action by the widow for the recovery of rents, and does not estop him from denying

EVIDENCE—CONTINUED.

- the husband's seizin of the lands.—*Harrison v. Boyd*..... 533
54. *Admissibility of judgment for or against purchaser, as evidence for or against vendor.*—In an action of trespass against a sheriff, for seizing and selling plaintiff's property under execution against his vendor, a judgment for or against the plaintiff would not be admissible evidence for or against his vendor in another action; consequently, under section 2302 of the Code, his vendor is a competent witness for the plaintiff.—*Sawyer v. Ware*..... 675
55. *Conclusiveness of judgment.*—A judgment at law on a promissory note, given for the purchase-money of land, is conclusive between the parties as to the amount then due on the note; and the defendant, when subsequently seeking a specific performance of the contract in equity, cannot claim the benefit of payments which ought to have been credited on the note. *Bohe's Heirs v. Stickney*..... 482

EXECUTION.

1. *Supersedeas; description of execution.*—In the description of an execution in a *supersedeas*, the only essential particulars are, the parties, the amount required to be made, the court from which, and the time when it was issued. When the sheriff is ruled for failing to make the money on the execution, and relies on the *supersedeas* proceedings as a defense, a defective description of the execution in the *supersedeas* may be aided by reference to the petition, fiat and bond to which it refers; and the execution which was superseded being thus identified with the execution on which the motion is founded, the plaintiff cannot take advantage of immaterial discrepancies between it and his own description of it in his motion.—*Walker v. Hunter*..... 125
2. *When title passes to purchaser, as against execution creditor of vendor.*—Under a verbal contract for the sale of an article to be manufactured by the vendor, if the contract is within the statute of frauds, the title does not pass to the purchaser until there has been a delivery to him; and if a valid execution against the vendor is in the hands of the sheriff during the interval between the manufacture and the delivery of the article, the lien of the execution is superior to the title of the purchaser.—*Sawyer v. Ware*..... 675

EXECUTORS AND ADMINISTRATORS.

1. *Jurisdiction of probate court to grant administration.*—The jurisdiction of the probate court, in the matter of the grant of letters testamentary, and of administration, is original, general, and unlimited; and hence every reasonable presumption will be indulged in favor of its orders, when collaterally assailed. *Gray's Adm'rs v. Cruise*..... 550

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. *Validity of grant of administration de bonis non.*—A grant of letters of administration *de bonis non*, when there is in fact no vacancy in the administration, will be held void, even in a collateral proceeding; but it will not be held void, in a collateral proceeding, merely because it fails to show the appointment and removal, resignation, or death, of the administrator in chief; and where the record shows the regular appointment of the administrator in chief, and that on a subsequent day it was ordered that his "resignation be received and recorded," and that letters of administration *de bonis non* were on the same day granted to another, it will be presumed that the resignation was of the office of administrator, and was in writing as required by the statute..... 559
3. *Same.*—Where a transcript from the records of the probate court, purporting to be "a full, true and complete exemplification of the records and files of said court touching the administration" of a decedent's estate, shows a grant of administration *de bonis non*, on the condition that the party execute and file a bond, but does not show that the bond was executed and filed as required by the order, it will be presumed in favor of the validity of a subsequent grant of administration, when collaterally assailed, that the party failed to comply with the condition..... 559
4. *Assent to legacy.*—Where a life-estate in the bulk of the testator's property, consisting of lands, slaves, &c., is given to his widow, who is also appointed executrix; and who afterwards procures the probate of the will, and qualifies as administratrix with the will annexed,—her continuous use of the property during her life, in accordance with the provisions of the will, is an implied assent to her own legacy, which involves an assent to the legacy to the remainder-men.—*Camp v. Coleman* ... 163
5. *Liability of administrator for interest; presumption in favor of judgment.*—On appeal from a judgment of the circuit court, reversing a decree of the probate court,—by which decree an administrator was charged with interest on the money in his hands, although he made the statutory affidavit, (Code, § 1813;) if the record does not show, by bill of exceptions or otherwise, the evidence which was before the probate court, the appellate court will presume that the evidence justified its decision. *Roundtree & Kirby v. Snodgrass*..... 185
6. *Administrator's authority to rent lands.*—Under the provisions of the Code, (§§ 1737, 1751,) the administrator of an insolvent estate may rent out the lands belonging to the estate, and receive and hold the rents as assets; consequently, the heir cannot maintain an action against him to recover such rents. *Boynton v. McEwen*..... 348
7. *Payment of debts by administrator of insolvent estate.*—In paying debts, not of a preferred class, before the expiration of

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- eighteen months from the grant of administration, an administrator acts at his peril: if the estate afterwards proves to be insolvent, he cannot charge it with the amount so paid by him, though he may be substituted for the creditors so paid, and receive the distributive share of the assets to which they would have been entitled; and this relief he may obtain in the probate court, without resorting to chancery.—*McNeill v. McNeill* 109
8. *Satisfaction of mortgage by administrator.*—The administrator of an insolvent estate has authority to discharge an incumbrance on property belonging to it, whenever the interests of the estate would be thereby promoted; but, after selling, under an order of the probate court, lands which were incumbered by a mortgage executed by the intestate in his life-time, he cannot pay the mortgage debt in full out of the proceeds of sale, and charge the estate with the payment..... 109
9. *Purchase by administrator, at his own sale, set aside.*—The purchase of a slave by the administrator in this case, at a sale made by himself under an order of the probate court, was set aside at the instance of the distributees of the estate, on proof that very few persons were present at the sale; that only one bid was made; that the price at which the slave was knocked off was less, by \$200 to \$400, than her real value; that the administrator made no effort to attract a crowd at the sale, and declined to impart information as to the time and place of sale to the intestate's father, who, as he knew, desired to purchase..... 623

FRAUDS, STATUTE OF.

1. *Three years possession of personalty under loan.*—Section 1295 of the Code, as to three years possession of personal property under a loan, being a re-enactment of the former statute, (Clay's Digest, 255, § 2,) is not confined in its operation to possessions commenced or continued for three years since the Code went into effect: consequently, to enable a creditor of the loanee to subject the property to the payment of his debt, it is not necessary that he should show three years continuous possession before the Code went into effect, or three years continuous possession since that time.—*Durden v. McWilliams*..... 345
2. *Contract not to be performed within one year.*—A verbal contract for the performance of services as an overseer, for the term of twelve months, to commence at a future day, is void under the statute of frauds, (Code, § 1551, sub. 1;) and a partial performance of it, coupled with a discharge without cause, will not enable the party to recover the stipulated wages after the termination of the twelve months.—*Scoggin v. Blackwell*..... 351
3. *Sale of lands; memorandum of sale by auctioneer.*—Where lands are sold at auction, and the entry on the auctioneer's book

FRAUDS, STATUTE OF—CONTINUED.

- does not show the name of the person on whose account the sale is made, nor refer to any other writing in which the name is stated, the sale is void under the statute of frauds, (Code, §§1551-52,) and the defective entry cannot be aided by parol evidence.—*Knox v. King*. 367
4. *Promise to pay debt of another*.—Where the defendant, a widow, before the grant of administration on the estate of her deceased husband, “verbally instructed or requested plaintiff or one of his clerks to let one S., a man in the employment of the estate, have out of plaintiff’s store whatever articles he wanted, and the estate would pay it,”—*held*, that the promise was an original undertaking, not within the statute of frauds, and was binding on the defendant personally, on proof that the goods were furnished on the faith of it, although charged on plaintiff’s books to the estate, and that the administrator refused to pay for them.—*Ledlow v. Becton*. 596
5. *Contract for sale of chattels at price exceeding \$200*.—A contract between the lessor and lessee of certain iron-works, to the effect that “the iron made at the furnace should be W.’s, [lessor] as fast as it was made, until he was paid for his advances in money and the rent due,” is within the statute of frauds, (Code, § 1551,) if the amount of the advances and rent exceeds \$200; and the agreement for the discharge of the purchase-money does not show such payment as will take the case out of the statute.—*Sawyer v. Ware*. 675
6. *Effect of statute*.—The statute of frauds prevents the enforcement of a contract within its provisions, unless evidenced according to its requirements; but it does not prevent the voluntary execution of such contract by the parties, nor annul it when thus executed. 675
7. *Same*.—The fact that a contract in writing, signed by only one of the parties, contains stipulations to be performed by the other which are within the statute of frauds, will not prevent a reformation of the instrument in equity at the suit of the latter.—*Thompson v. Marshall*. 504

GARNISHMENT.

See ATTACHMENT.

GUARDIAN AND WARD.

1. *Compensation of guardian*.—Under the provisions of the Code, (§ 2039, 1825,) a guardian is not entitled to any compensation for his services in lending out the funds of his ward, and compounding the interest accruing thereon; that being one of his ordinary duties, and not belonging to the class of “special or extraordinary services.”—*Allen v. Martin*. 330
2. *Non residence of guardian good cause of removal*.—The removal

GUARDIAN AND WARD—CONTINUED.

- of a guardian from the State being declared by the statute a sufficient cause for the revocation of his letters, (Code, § 2037,) his non-residence at the time of his appointment is necessarily a good cause for his removal, without regard to the age of the ward, or the refusal of the person afterwards nominated by him to accept the office of guardian.—*Cockrell v. Cockrell*.... 673
3. *Mother's right, as guardian, to custody of infant children*.—Under the statutes of this State, (Code, §§ 2014–15,) as at common law, the mother is entitled, on the death of the father, to the custody of infant children under fourteen years of age: but this right is not beyond the control of courts of justice.—*Striplin v. Ware*..... 87
4. *Removal of mother from custody of infant children*.—The chancery court will remove infant children from the custody of their father or mother, whenever it is clearly shown that their morals, safety or interests require their removal; but this jurisdiction is one of extreme delicacy, and will only be exercised in cases of gross misconduct on the part of the parent, or inability from some cause to furnish proper nurture and training for the child. The fact that the second husband of the mother, who shares with her the care and management of her infant children, is not a man of unexceptionable morals, and is addicted to profanity, even in the presence of his family, is not sufficient cause for the removal of the children from the custody of the mother, against her wishes, when it is shown that they are treated kindly, are well fed, well clothed, and sent to school; that no charge is made for their board and lodging, and that they are of such tender years as to require their mother's constant watchfulness and care..... 87
5. *Purchase by executor and guardian at his own sale*.—The defendant having married the complainants' mother, who was at the time their guardian by appointment from the probate court, and also executrix of their deceased father's will; and having afterwards procured from the probate court, as executor in right of his wife, an order for the sale of decedent's real estate, which was devised to the complainants jointly with their mother; and having himself become, through an agent, the purchaser at the sale,—the sale was set aside at the instance of the infant devisees, although no fraud, unfairness, or inadequacy of price was shown.—*Calloway v. Gilmer*..... 354

HABEAS CORPUS.

1. *When right to freedom may be tried by habeas corpus*.—Although a negro, or person of color, if held as a slave, cannot test his right to freedom by petition for *habeas corpus*; yet, when a white person is held as a slave, a petition for *habeas corpus* may be sued out in his behalf.—*Guilford v. Hicks*..... 9

See, also, BAIL.

HUSBAND AND WIFE.

1. *Husband's marital rights to wife's realty.*—The husband acquires, by the marriage, the right to use and occupy, during coverture, lands belonging to the wife, whether her title be governed by the "woman's law" or not.—*Bishop v. Blair*..... 80
2. *Husband's marital rights: how affected by adultery, abandonment of wife, and intention that she should hold property as her own.*—The husband's marital rights attach, as against the surviving wife, to slaves which are delivered to her during the coverture, as her distributive share of a decedent's estate, although the husband, at the time of such delivery, had abandoned the wife, and was living in adultery with another woman, and so continued to live up to the time of his death; and although he never had the actual possession of the slaves, nor claimed them, but intended that his wife should hold and enjoy them as her separate property.—*Bell v. Bell's Adm'r*..... 466
3. *Devise to husband and wife.*—At common law, under a devise to husband and wife during coverture, the entire estate vested in both of them as one person, and, on the death of either, continued in the survivor; but, under the statutes of this State creating and regulating the separate estates of married women, (Code, §§1981-97,) such a devise creates the same estate in the parties as if it had been made before coverture; on the death of the wife intestate, her undivided moiety descends to her heirs-at-law, subject to the statutory rights of her surviving husband during his life; and on the subsequent death of the husband, the wife's heirs become entitled to the possession of her undivided moiety.—*Walthall v Goree*..... 728
4. *Removal of husband as trustee.*—A deliberate and permanent abandonment of the wife by the husband, without reasonable cause, is sufficient (Code, § 1994) to authorize his removal from the trusteeship of her statutory separate estate.—*Boaz v. Boaz*. 334
5. *When wife's administrator may come into equity.*—The personal representative of the wife cannot maintain a bill in equity, against the personal representative and heirs-at-law of the husband, to recover property which accrued to the wife after her desertion by the husband; which was claimed, held and controlled by her as a feme sole: of which the husband never had possession, and to which he never asserted any claim or title. *Bell's Adm'r v. Bell*..... 195
6. *When widow may come into equity, against husband's administrator.* A widow cannot maintain a bill in equity, against the administrator of her deceased husband, to recover money belonging to the corpus of her statutory separate estate, which the husband had received in his life-time, and had not paid over or accounted for. (A. J. WALKER, C. J., *dissenting*).—*Bennett's Adm'r v. Bennett*..... 571

INSOLVENT ESTATES.

1. *Payment of debts by administrator.*—In paying debts, not of a preferred class, before the expiration of eighteen months from the grant of administration, an administrator acts at his peril: if the estate afterwards proves to be insolvent, he can not charge it with the amount so paid by him, though he may be substituted for the creditors so paid, and receive the distributive share of the assets to which they would have been entitled; and this relief he may obtain in the probate court, without resorting to chancery.—*McNeill v. McNeill*..... 109
2. *Satisfaction of mortgage by administrator.*—The administrator of an insolvent estate has authority to discharge an incumbrance on property belonging to it, whenever the interests of the estate would be thereby promoted; but, after selling, under an order of the probate court, lands which were incumbered by a mortgage executed by the intestate in his life-time, he cannot pay the mortgage debt in full out of the proceeds of sale, and charge the estate with the payment..... 109
3. *Administrator's authority to rent lands.*—Under the provisions of the Code, (§§ 1737, 1751,) the administrator of an insolvent estate may rent out the lands belonging to the estate, and receive and hold the rents as assets; consequently, the heir cannot maintain an action against him to recover such rents. *Boynton v. McEwen*..... 348

JOINT TENANTS.

See ACTION, 4.

JUDGMENTS AND DECREES.

1. *Requisites of decree.*—The failure of the probate judge to sign the minutes of the term, does not invalidate a decree, nor render it inadmissible as evidence under the plea of *nul tiel record*. *Frazier's Executors v. Praytor*..... 691
2. *Form of judgment in proceeding against executor.*—In a proceeding before the probate court, by which the legatees seek to charge the executor with the value of a slave not included in his inventory; the jury having returned a verdict against the executor, assessing the value of the slave at a specified sum,—the court cannot render a judgment against the executor, for the assessed value of the slave.—*Mims v. Sturdevant*..... 636
3. *Conclusiveness of judgment.*—A judgment at law on a promissory note, given for the purchase-money of land, is conclusive between the parties as to the amount then due on the note; and the defendant, when subsequently seeking a specific performance of the contract in equity, cannot claim the benefit of payments which ought to have been credited on the note.—*Bobe's Heirs v. Stickney*..... 482

JUDGMENTS AND DECREES—CONTINUED.

4. *Same*.—A judgment for the claimant, in a trial of the right of property under the statute, is not a bar to a subsequent action by him to recover damages for the tortious taking of his property under the execution.—*Lenoir's Adm'r v. Wilson*..... 600
5. *Conclusiveness of probate decree*.—A decree of the probate court against an administrator, under his appointment by virtue of his office of sheriff, concludes the sureties on his official bond as sheriff from contesting, before that court, their liability for the default ascertained by the decree, on the ground that, after the expiration of their principal's term of office as sheriff, he was appointed administrator *de bonis non* in his individual capacity, and gave bond with new sureties, who thereby became liable for his previous default.—*Ragland v. Calhoun's Adm'r*.... 606
6. *Validity of grant of administration de bonis non*.—A grant of letters of administration *de bonis non*, when there is in fact no vacancy in the administration, will be held void, even in a collateral proceeding; but it will not be held void, in a collateral proceeding, merely because it fails to show the appointment and removal, resignation, or death, of the administrator in chief; and where the record shows the regular appointment of the administrator in chief, and that on a subsequent day it was ordered that his "resignation be received and recorded," and that letters of administration *de bonis non* were on the same day granted to another, it will be presumed that the resignation was of the office of administrator, and was in writing as required by the statute..... 559
7. *Same*.—Where a transcript from the records of the probate court, purporting to be "a full, true and complete exemplification of the records and files of said court touching the administration" of a decedent's estate, shows a grant of administration *de bonis non*, on the condition that the party execute and file a bond, but does not show that the bond was executed and filed as required by the order, it will be presumed in favor of the validity of a subsequent grant of administration, when collaterally assailed, that the party failed to comply with the condition..... 559
8. *Assignment of judgment*.—An assignment of a judgment, in these words, "For value received, I hereby transfer the entire control of the *fi. fa.* from the above stated judgment, and of the judgment above stated, from this date, to A. B. G.—is an unqualified transfer of the judgment.—*Griffin v. Camack*..... 695

JURISDICTION.

1. *Of city court of Mobile at special terms*.—Under the act of 1858, "to repeal an act therein named regulating the sessions of the circuit and city courts of Mobile," (Session Acts 1857-8, p. 57, § 3,) the city court has authority, at a special term, to origi-

JURISDICTION—CONTINUED.

- nate business, to take indictments, and to organize a grand jury. 236
2. *Of probate court to sell real estate.*—The probate court has no jurisdiction to order the sale of lands, for the purpose of division among a decedent's heirs-at-law or devisees, when the decedent had, at the time of his death, no title whatever to the land, either legal or equitable.—*Bishop v. Blair*. 80
3. *Of probate court to grant administration.*—The jurisdiction of the probate court, in the matter of the grant of letters testamentary, and of administration, is original, general, and unlimited; and hence every reasonable presumption will be indulged in favor of its orders, when collaterally assailed. *Gray's Adm'rs v. Cruise*. 559
4. *Of circuit court, and of register in chancery, in causes transferred from probate court.*—The jurisdiction of the circuit court under the act of 1850, (Session Acts 1849–50, p. 36, § 40,) and of the register in chancery under the Code, (§§ 560, 1910–12,) in causes transferred from the probate court on account of the incompetency of the probate judge, is special and limited; consequently, the record in a transferred cause must affirmatively show the jurisdiction of the court to which the transfer is made.—*Wilson v. Wilson*. 655
5. *Same.*—If the record in a transferred cause recites the jurisdictional fact which authorized the transfer, the recital is conclusive in a collateral proceeding, and the validity of the subsequent orders and decrees cannot be impeached on account of irregularities; but a simple recital of the legal conclusion, that the probate judge “is incompetent,” without stating the fact from which the incompetency results, is not sufficient to support the jurisdiction. 655
6. *Incompetency of presiding judge from interest.*—Where the probate judge is one of the sureties on an administration bond, he is incompetent from interest to preside on the settlement of the administration, or to make any order affecting the liability of the administrators under their bond; and if one of the administrators is also the guardian of the sole distributee of the estate, and the administration has never been settled, he is also incompetent to preside on the settlement of the guardian's accounts; and if the guardianship has never been settled, although the guardian has been removed, he is equally incompetent to preside on the settlement of the accounts of the succeeding guardian, who is sought to be charged with negligence in failing to collect from his predecessor assets belonging to the estate of his ward. 655

JUSTICE OF THE PEACE.

1. *Garnishment on judgment.*—Under the provisions of the Code, (§§ 2471, 2819,) a justice of the peace has authority to issue a garnishment on a judgment rendered by him.—*Gould v. Meyer*. 565

JUSTICE OF THE PEACE—CONTINUED.

2. *Practice in appeal cases.*—Ordinary appeal cases from justices' courts are triable *de novo* in the circuit court; and that court may render judgment, on appeal by the defendant, for a larger amount than was recovered before the justice.—*Brooks v. Carter*..... 682
3. *Variance between summons and complaint.*—In an action of forcible entry and detainer, or unlawful detainer, removed by appeal from a justice's court into the circuit court, (Code, § 2864,) the cause being triable *de novo*, the complaint should not be rejected, on account of a variance between it and the cause of action endorsed on the summons issued by the justice.—*Van Aspen v. Townsend*..... 582
4. *Practice on error in appeal or certiorari cases.*—In appeal and *certiorari* cases, which, when the amount in controversy is less than \$20, are tried by the court without the intervention of a jury, (Code, § 2369,) the judgment of the circuit court will not be reversed on error, unless its decision on the facts is shown to be manifestly wrong.—*Dane v. Mayor of Mobile*... 304

LAND LAWS.

1. *Location of lands by State, under act of congress of 11th August, 1848.*—The act of congress of August 11, 1848, (9 U. S. Statutes at Large, 281,) having placed at the disposal of the legislature of this State, for the use of schools in the valueless sixteenth sections, certain lands theretofore granted to the State for internal improvements, (5 *ib.* 455,) and authorized the legislature to locate the same; and the legislature having, by the act of February 13, 1850, (Session Acts 1849-50. p. 82.) authorized the issue of certificates of purchase for these lands by the comptroller of public accounts, or by a locating agent,—a certificate of purchase, signed by the governor, and countersigned by the secretary of state, being issued without authority, does not evidence a selection of the land by the State, and cannot defeat a recovery by one claiming under subsequent entry from the United States.—*Matthews v. Baker*..... 186
2. *Patent to deceased person.*—Under the act of congress of May 20, 1836, (5 U. S. Statutes at Large, 31,) a patent issued in the name of a person then deceased enures to the benefit of his heir, devisee or assignee, and the heir may maintain an action at law on such patent.—*Phillips v. Sherman*..... 189
3. *Validity and conclusiveness of patent.*—A patent issued under the act of congress of August 26, 1842, "for the relief of John Pratt, or his legal representative," (6 U. S. Statutes at Large, 865,) cannot be collaterally assailed, in a court of law, on the ground that the person to whom it was issued was not the legal representative of said Pratt; that question having been controverted before the commissioner of the general land-office, and decided

LAND LAWS—CONTINUED.

- by him in favor of the patentee, and his decision having been affirmed by the secretary of the interior on appeal..... 189
4. *Cancellation of patent wrongfully issued.*—When a patent has been wrongfully or erroneously issued, the commissioner of the general land-office may, at any time before its delivery from the local land-office, revoke and cancel it..... 189
5. *Powers of commissioner of general land-office, under act of congress of August 3d, 1846, and validity of sale ordered by him.*—Under the act of congress of August 3d, 1846, "providing for the adjustment of all suspended pre-emption land-claims." (U. S. Statutes at Large, vol. 9, pp. 51-2,) the commissioner of the general land-office being authorized to order, absolutely and unconditionally, the sale of lands which, under the provisions of that act, shall have reverted to the United States, the fact that he instructed the officers of the district land-office to offer such lands for sale, "if, after a careful examination of the books and maps in their office, there appeared on them no objection to offering the same for sale," does not affect the validity of the purchaser's title, when it is not shown that any valid objection to the sale appeared on the books and maps of the district office. Moreover, the said act of congress having confided the question of sale *vel non* to the discretion of the commissioner of the general land-office, and having failed to prescribe any mode of ascertaining the existence of the facts on which depended the propriety of a sale, the ordering of the sale by the commissioner is evidence that the facts existed which rendered such sale proper.—*McTyer v. McDowell*..... 39
6. *Transfer of pre-emption right.*—Under the act of congress of May 29th, 1830, granting pre-emption rights to settlers on the public lands, (U. S. Statutes at Large, vol. 4, pp. 420-21,) an assignment or transfer of the right of pre-emption, prior to the issue of a patent, is declared to be "null and void," and does not pass the right of pre-emption to the transferee; consequently, such transferee cannot defeat a recovery by one claiming under subsequent patent from the United States, by simply showing that the transferor, prior to his assignment, had a pre-emption right to the land, and offered to pay the entrance-money to the proper land-officers, but that they refused to receive it, and would not let him perfect his entry..... 39

LANDLORD AND TENANT.

1. *Estoppel against tenant from denying landlord's title.*—An order of the commissioners' court, granting to the defendant a private right of way through the plaintiff's lands, does not estop the defendant, when sued for the commission of a trespass on lands outside the track of the private road, from disputing the plaintiff's title to the land.—*Bishop v. Blair*..... 80

LANDLORD AND TENANT—CONTINUED.

2. *Same*.—The acceptance of a lease from a stranger, by a party who is in possession of land, if done "in ignorance of his rights," does not estop him from afterwards impeaching the validity of such stranger's title.—*Cain v. Gimon*. 168

LEGACY AND DEVISE.

1. *Devise to husband and wife*.—At common law, under a devise to husband and wife during coverture, the entire estate vested in both of them as one person, and, on the death of either, continued in the survivor; but, under the statutes of this State creating and regulating the separate estates of married women, (Code, §§1981-97,) such a devise creates the same estate in the parties as if it had been made before coverture: on the death of the wife intestate, her undivided moiety descends to her heirs-at-law, subject to the statutory rights of her surviving husband during his life; and on the subsequent death of the husband, the wife's heirs become entitled to the possession of her undivided moiety.—*Walthall v Goree*. 728
2. *Bequest construed to create life-estate in widow, charged with support and education of grand-children*.—Where a testator, by the second clause of his will, devised and bequeathed to his wife all the property of which he might die possessed, "during the term of her natural life, to be kept together" on his plantation "for the purpose of supporting her, and for the support and education of my [his] five grand-children;" and, by the fourth clause, devised a tract of land to one of his daughters, "which," he declared, "is excepted out of the life-estate heretofore given to my wife,"—*held*, that the widow took the entire life-estate, charged with the support and education of the grand-children, and not in trust for their benefit equally with herself.—*Coleman v. Camp*. 159
3. *Bequest to widow and executrix construed as enuring to her individually, and not officially*.—Under a devise and bequest in the following words: "I give and bequeath to my wife Rebecca all the property, both real and personal, of which I may die possessed, (except as hereinafter excepted,) during the term of her natural life, to be by her kept together on my plantation on which I now reside, for the purpose of supporting my said wife, and for the support and education of my five grand-children, the children of my deceased son Washington; and after her death, then said property and estate to be disposed of as follows,"—whatever interest vests in the widow, she takes individually, and not as executrix; and if a trust is thereby imposed upon her, it does not attach to the office of executrix, nor pass on her death to her co-administrator.—*Camp v. Coleman*. 163
4. *Assent to legacy*.—Where a life-estate in the bulk of the testa-

LEGACY AND DEVISE—CONTINUED.

tor's property, consisting of lands, slaves, &c., is given to his widow, who is also appointed executrix; and who afterwards procures the probate of the will, and qualifies as administratrix with the will annexed,—her continuous use of the property during her life, in accordance with the provisions of the will, is an implied assent to her own legacy, which involves an assent to the legacy to the remainder-men..... 163

LIMITATIONS, STATUTE OF.

1. *Adverse possession by purchaser, under color of title.*—If a purchaser enters into the possession of land under a vendor's bond, conditioned to make titles when the purchase-money is paid, he cannot, so long as the purchase-money remains unpaid, set up adverse possession against the vendor under color of title; but, after the purchase-money has been paid in compliance with the terms of the contract, such a bond is color of title, and subsequent possession under it for a sufficient length of time will bar the legal title.—*McQueen v. Ivey*..... 306
2. *Statute of limitations against sheriff's sureties.*—The act of 1832, prescribing six years as the period within which an action must be commenced against the sureties of public officers for the default of their principal, (Clay's Digest, 329, § 90,) does not apply to a summary proceeding against the sureties of a sheriff on his official bond, for the default of their principal as administrator by virtue of his office as sheriff.—*Ragland v. Calhoun's Adm'r* 606

LUNATICS.

1. *Meaning of non compos mentis.*—The term *non compos mentis* denotes neither mere mental weakness, nor a total deprivation or destruction of the intellectual powers, but simply unsoundness of mind.—*In re Carmichael*..... 514
 2. *Form and sufficiency of verdict.*—It is the safer and more satisfactory practice to have the verdict in the very language of the statute, (Code, § 2753,) or its substance..... 514
- See, also, EVIDENCE, 10–11, 41–44.

MANDAMUS.

1. *Against whom mandamus lies.*—A *mandamus* lies against the governor of the State, as well as any other public functionary, to compel the performance of a purely ministerial duty enjoined by statute.—*Tenn. and Coosa Railroad Co. v. Moore*... 371
2. *And when.*—Where a sum of money is loaned by act of the legislature to a railroad company, on its complying with certain terms and conditions in said act prescribed; and the governor is required, on the performance of these conditions by

MANDAMUS—CONTINUED.

- the company, to accept its bond for the faithful application and repayment of the money, and to draw his warrant in its favor, on the custodian of the fund, for the sum thus loaned, a *mandamus* will lie to compel the performance by the governor of this ministerial duty, since an action for damages, if it could be maintained, would not afford adequate and complete redress. 371
3. *Same*.—If a court prohibits an attorney, whose license authorizes him to practice before it, and who has not been removed or suspended in the mode prescribed by the statute, from appearing at its bar as counsel in causes in which he has been employed, this is the deprivation of a clear legal right, to the enjoyment of which he will be restored by *mandamus*.—*Withers v. The State*. 252
4. *Averments of petition for mandamus*.—In an application for a *mandamus*, by an attorney-at-law who has been denied the right to appear as counsel in a municipal court, an averment that the relator "is a practitioner of law in all the courts of this State, both of state and federal jurisdiction," is not a sufficient allegation of his legal right to practice as an attorney in the courts named. 252

MORTGAGES.

1. *Contract held conditional sale, and not mortgage*.—A written instrument, signed by the defendant, reciting that he had purchased from the complainant several slaves, specifying the name and separate value of each, and then stipulating that, if the complainant "shall redeem, or cause to be redeemed, any part of said negroes within seven years", the defendant would make a specific deduction from the value of each: whether considered by itself, or in connection with an absolute bill of sale, executed on the next day, which acknowledged the receipt of the money in full payment for the slaves, and contained a warranty of soundness and title, is a conditional sale, and not a mortgage; nor will a court of equity declare the contract to be a mortgage, on proof that the complainant at first applied to the defendant for a loan of money, or other pecuniary aid—that the defendant declined to loan money, but made another proposition in reply, to which the complainant did not accede; and that by the arrangement finally concluded between them, the defendant assumed a large debt due from the complainant to a third person, took the negroes at the prices specified in the writings above mentioned, and received from the complainant his several promissory notes for the difference between the aggregate price of the slaves and the amount of the assumed debt; there being no proof of fraud, imposition, or unfairness, nor any great disparity between the value of the slaves and the price agreed to be paid.—*Swift v. Swift* 147

MORTGAGES—CONTINUED.

2. *Constructive notice of mortgage.*—The registration of a mortgage is constructive notice only to those who hold under the mortgagor, (correcting *dictum* in *Center v. P. & M. Bank*, 22 Ala. 743;) but, if the mortgagor, having voluntarily destroyed an unregistered deed to himself, and procured the execution of a deed by his vendor to a trustee for his wife, joins with his wife and the trustee in a conveyance to a purchaser, the registration of the mortgage charges the purchaser with constructive notice of such unregistered deed, and he cannot successfully defend an action at law by one claiming under a subsequent purchase at execution sale against the mortgagor.—*Gimon v. Davis* 589
2. *Purchase by mortgagee at his own sale.*—A purchaser of land, having executed to his vendor a mortgage to secure the payment of the purchase-money, and having afterwards resold the land to a third person, who agreed that he would discharge the unpaid balance due to the vendor, and that the land should remain bound by the mortgage, is not within the rule which forbids a mortgagee to purchase at his own sale, and may become the purchaser at the sale under the mortgage.—*McNeill v. McNeill* 109
4. *Same; who may impeach sale, and on what ground.*—The wife of the mortgagor, claiming under a voluntary conveyance from her husband subsequent to the mortgage, may, in equity, impeach the validity of the sale under the mortgage; and if her bill alleges that the mortgage debt was nearly (if not quite) paid, that the mortgagee concealed from her the true state of the account between himself and the mortgagor, had the property sold for a pretended debt greater than was actually due, and, in effect, became himself the purchaser at the sale, she makes out a case for equitable relief.—*Cain v. Gimon* 168
5. *Who may take advantage of usury.*—The wife of the mortgagor, claiming under a subsequent voluntary conveyance to her husband, and seeking to impeach the validity of the sale under the mortgage, and to be let in to redeem, cannot take advantage of usury in the mortgage debt. 168

NON-CLAIM.

See ESTATES OF DECEDENTS, 2.

OFFICERS.

1. *Validity of official acts of officer de facto.*—The official acts of an officer *de facto* are valid, so far as the rights of the public, or of third persons having an interest therein, are concerned, and cannot be indirectly called in question in a proceeding to which he is not a party.—*Heath v. The State* 273

PARENT AND CHILD.

See GUARDIAN AND WARD, 3, 4.

PARTNERSHIP.

1. *What constitutes partnership.*—A contract, by which the plaintiff agreed to let the defendants have all the pine timber on his lands that was suitable for good lumber, and the defendants agreed to pay him therefor, annually, in money, one-fifth of the gross proceeds of the lumber sold and collected by them, does not constitute the parties partners *inter sese*.—*Fail & Miles v. McRee*..... 61
2. *Same.*—The fact that a negro-trader, in whose sales-house slaves are exhibited for sale and sold by the owner, charges half-commissions for the use of his house, does not constitute him a partner with the owner in the sale.—*Dillard v. Scruggs*..... 670

PAYMENT.

1. *Remittance of money by mail.*—To absolve a debtor from the hazard of loss, in the transmission of money by mail to his creditor, it is necessary that the remittance should be made by the authority of the creditor, and in the manner and with the precautions prescribed by him; and this principle is not affected by the impossibility of a compliance, on the part of the debtor, with the conditions and directions prescribed by the creditor.—*Williams & Smart v. Carpenter & Co.*..... 9
2. *Application of payments.*—If a debtor, owing several demands to the same creditor, makes a general payment, without giving any directions as to its appropriation, the creditor may, at his election, apply it to any one of the debts then due, but cannot prefer a debt not due, to the exclusion of one due or past due; and if he fails to make any election, the law will make the application according to fixed rules, preferring a debt due to one not due.—*Bobe's Heirs v. Stickney*..... 482
3. *Same.*—Where a debtor owes two notes, maturing at different times, and the creditor has brought suit on the first; and, on the day the second note matures, the debtor makes a general payment, without giving any directions as to the manner of its appropriation, the fact that the creditor afterwards takes judgment on the first note, for the full amount due thereon with interest, shows an election on his part to apply the payment to the second note..... 482
4. *Same.*—If a debtor owes two distinct demands, both over-due, and makes a general payment, without giving any directions as to its application, the law will apply it, in the absence of a specific application by the creditor, to that demand which, though not barred at the time the payment was made, has since become barred by the statute of limitations, or of non-claim. (*STONE, J., dissenting.*)—*Robinson's Adm'rs v. Allison*..... 525

PLEADING AND PRACTICE.

I. PARTIES.

1. *Who is proper party plaintiff.*—It is not necessary, under section 2129 of the Code, that an action for a breach of warranty of the soundness of a slave should be brought in the name of the party really interested.—*Newsom v. Huey*..... 37
2. *Same.* A certificate, issued and signed by the chief engineer of a railroad company in these words: "This is to certify, that the sum of \$1000 is due to A. B. from the Ala. & Miss. Rivers Railroad Company, for bridging and track-laying,"—is a contract for the payment of money, within the meaning of the statute, (Code, § 2129) requiring an action to be brought in the name of the party really interested.—*Ala. & Miss. Rivers Railroad Co. v. Sanford & Reid*..... 703
3. *Same.*—Where several persons are interested in money bet and lost on a horse-race, an action may be brought for the use of the wife of any one of them, without joining the others, to recover her husband's portion of the money.—*Davis v. Orme*..... 540

II. DECLARATION, OR COMPLAINT.

4. *In trespass qu. cl. fr.*—In trespass for injuries to land, it is not necessary that the complaint should allege that the land is situated in the county in which the action is brought: if it conforms substantially with the form given in the Code, (p. 555,) it is sufficient.—*Pike v. Elliott*..... 69

III. DEMURRER.

5. *Effect of demurrer.*—Under section 2253 of the Code, which requires a specification of the grounds of demurrer, a demurrer to a plea cannot be visited upon the complaint.—*Newsom v. Huey*..... 37
6. *Presumption in favor of regularity of demurrer.*—When a demurrer has been sustained by the primary court, the appellate court will presume, unless the record affirmatively shows the contrary, that the causes of demurrer were specified, as required by the statute. 37

IV. PLEAS.

7. *Form and requisites of plea.*—A plea which assumes to answer the whole complaint, but does not negative the cause of action set out in one of the counts, is demurrable. 37
8. *Error without injury in rulings on pleadings.*—The wrongful sustaining of a demurrer to a special plea, when the defendant might have had the benefit of the same defense under his other pleas, is, at most, error without injury.—*Powell v. Astin*..... 140
9. *Waiver of objection to plea of tender.*—If issue is joined on a plea of tender, without objection to its sufficiency, the plaintiff can not be heard to insist that the plea was not filed in time, or

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- that it was not accompanied by a payment of the money into court at the first term.—*Rudolph v. Wagner*..... 698
10. *When sworn plea is necessary*.—In an action against a railroad company, on a certificate issued by its engineer for work done by a contractor, (which certificate is alleged to have been signed and issued by the engineer as the authorized agent of the corporation, and to have been transferred by the contractor to plaintiff;) there being no sworn plea, denying the execution of the certificate,—the instrument itself is evidence of the existence of the debt, (Code, §§ 2238, 2278-79;) and if the action is brought by an assignee, proof of the assignment is not required of him, unless it is denied by a sworn plea.—*Ala. & Miss. Railroad Co. v. Sanford & Reid*..... 703

V. GENERAL PRACTICE.

11. *Allowing jury to use memoranda prepared by counsel*.—The practice of permitting the jury, on their retirement, to take with them memoranda prepared and used by counsel on the trial, should not be encouraged; but, where it appears that the memorandum simply "contained and referred to the various items of debit and credit contained in the accounts before the jury," and that the court specially instructed the jury, "that it was not to be regarded by them as evidence, and that they could not look to it for any purpose, except to aid them in referring to the various items of account before them,"—the appellate court will not reverse on account of its admission.—*Robinson's Adm'r's v. Allison*..... 525

RAILROADS.

1. *Construction of act of February 17, 1854, "to aid the Tennessee and Coosa railroad"*.—The act of February 17, 1854, entitled "An act to aid the Tennessee and Coosa railroad," (Sess. Acts 1853-4, p. 280,) is not void for uncertainty; the portion of the two and three per cent. funds therein specified, is advanced to the railroad company as a loan, and not as a gift; and the company is bound, in the absence of subsequent legislation as to the terms of payment, to repay the sum so loaned, in cash, within ten years, without interest for four years, and with interest at five per cent. *per annum* after four years.—*Tenn. & Coosa Railroad Co. v. Moore*..... 371

SLANDER.

1. *What words are actionable*.—To say of a female, that a certain man "keeps her," involves a charge of illicit sexual intercourse, when the words are understood in their ordinary, popular acceptance; consequently, under the Code, (§ 2220,) the words are, *per se*, actionable.—*Downing v. Wilson*..... 717

SURETIES.

1. *Right of contribution between co-sureties.*—In the absence of special circumstances rendering the general rule inapplicable, one surety is entitled to share in the benefit of any indemnity which a co-surety may have obtained from their principal, although such indemnity may have been intended for the benefit of the latter surety alone.—*Hartwell v. Whitman*..... 712
2. *Amount of recovery for contribution.*—In a summary proceeding for contribution between co-sureties, (Code, §2645,) a recovery can only be had for the defendant's aliquot proportion of the debt, although he may have been fully indemnified by the principal; consequently, evidence of such indemnity is irrelevant.—*Simmons v. Varnum*..... 92
3. *Subrogation of surety to vendor's lien.*—If the administrator of an insolvent estate pays in full, with his own individual funds, a note given for the purchase-money of land, on which he was bound as his intestate's surety, he cannot claim to be subrogated, in equity, to the vendor's lien on the land.—*McNeill v. McNeill*..... 109
4. *What will discharge surety.*—The failure and refusal of the lessor, when required by the lessee's surety, who was bound jointly with his principal by instrument under seal, to proceed by distress-warrant against the lessee, does not discharge the surety from liability.—*Brooks v. Carter*..... 682

TENDER.

1. *Sufficiency of tender.*—If the complaint claims interest only from the 1st January, although the debt was due before that day, the plaintiff cannot be heard to insist that a tender of the principal, between the day on which the debt matured and the 1st January, was not sufficient, because it did not include the interest which had then accrued.—*Rudolph v. Wagner*... 698
2. *Same.*—A tender of the entire amount due, including interest, at any time between the maturity of the debt and the commencement of suit, stops the interest, and discharges the debtor from the costs of suit..... 698
3. *Same.*—As a general rule, an actual production and proffer of the money is essential to constitute a valid tender; but, if the debtor is ready and willing to pay, and is only prevented from producing the money by the creditor's declaration that he will not receive it, this dispenses with an actual production of the money..... 698

See, also, PLEADING AND PRACTICE, 9.

TRESPASS.

1. *When action lies between joint tenants.*—Where there has been no actual ouster, one joint tenant of land cannot maintain an action of trespass against his co-tenant.—*Bishop v. Blair*..... 80

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2. *Form and sufficiency of complaint.*—In trespass for injuries to land, it is not necessary that the complaint should allege that the land is situated in the county in which the action is brought: if it conforms substantially with the form given in the Code, (p. 555,) it is sufficient.—*Pike v. Elliott* 69
3. *Relevancy of evidence.*—In trespass *quare clausum fregit*, the evidence of a witness who testifies to a trespass committed by defendant on lands belonging to plaintiff, but cannot identify those lands as the lands described in the complaint, cannot be excluded from the jury on motion. 69
4. *Plea of former recovery by plaintiff as claimant in trial of right of property.*—A judgment for the claimant, in a trial of the right of property under the statute, is not a bar to a subsequent action by him to recover damages for the tortious taking of his property under the execution.—*Lenoir's Adm'r v. Wilson*..... 600

TRIAL OF RIGHT OF PROPERTY.

1. *Competency of defendant in execution as witness for plaintiff.* Under the Code, (§ 2802,) the defendant in execution is a competent witness for the plaintiff, on a trial of the right of property.—*Durden v. McWilliams*..... 354

TROVER.

1. *When sub-bailee of hirer is liable in trover.*—If the hirer of a slave under a general contract, or under a special contract for his employment as a plantation hand, gratuitously lends him to another person, for the specific purpose of being employed in raising a gin-house, and the slave is killed while so employed, the sub-bailee is liable to the owner for his value, in trover, no matter what degree of care he exercised in having the work performed, although he had no notice of the owner's title, and no reason to suppose that the hirer was not the owner.—*Jones v. Fort* 449
2. *When action lies for conversion of promissory note.*—When a note is endorsed and transferred as collateral security, a subsequent payment of the original debt by the transferror operates as a re-transfer to him of the endorsed note; and if the creditor, or his personal representative, refuses to deliver the note on demand, trover lies against him for the conversion.—*Overstreet v. Nunn's Executors*..... 649

TRUSTS.

1. *Trustee's title under deed.*—Where slaves are conveyed by deed to a trustee, "or his legal representative," for the sole use and benefit of the grantor's unmarried daughter and her children, forever, the legal title of the trustee does not cease at the death

TRUSTS—CONTINUED.

- of the daughter, leaving children; and if the original trustee resigns, and another person is appointed in his stead by the circuit court, the death of the substituted trustee does not invest the children with the legal title.—*Williams v. McConico.* 22
2. *Same, under decree in chancery.*—Under a decree in a chancery suit, making partition of the estate of the complainant's deceased father among the distributees; settling the portion of the complainant, who was then a married woman, on a trustee, for her sole and separate use during life, with remainder to her children living at her death; appointing a trustee for her, and requiring that he "shall give bond, with surety, conditioned that he will account and pay over to the said Mary," [complainant,] "and to no one else, all such sums of money as he may receive as trustee aforesaid, (such bond to be in double the value of the personal estate, and double the annual income of the real estate,) and that he will faithfully perform such order and decree as the court may make touching the said trust estate"—the legal title is vested in the trustee until the termination of the life-estate, and is not devolved upon the *cestui que trust* by the death of the trustee before that time. *Witter v. Dudley.* 135
- See, also, CHANCERY, 17-23.

WAYS.

1. *Right of way appurtenant, and its incidents.*—A right of way, created by express grant in a devise, is appurtenant to the land devised, and passes by a conveyance of the land to a purchaser from the devisee, without express mention of the appurtenances; it is also a charge upon the servient lands, which attaches to them in the hands of a purchaser from the person to whom they were devised; and it is not terminated, or impaired, by the fact that the owner afterwards acquires from a third person mere permission, revocable at any time, to pass over other lands so as to reach his own.—*Lide v. Hadley* 627
- See, also, CHANCERY, 26-27.

WILLS.

1. *What is sufficient signing of will.*—Under the statute of this State, (Code, § 1611,) the testator's name may be signed for him by another person in his presence, and by his direction; and such signing may be made for him by one of the subscribing witnesses to the will.—*Riley v. Riley.* 496
2. *What is sufficient attestation.*—But one of the subscribing witnesses cannot sign the name of another subscribing witness, when the latter is able to write, and does not physically participate in the act of signing. 496
3. *What law governs revocation of will.*—The question whether a

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- will, executed in 1851, is impliedly revoked by a sale and conveyance of the land devised by it in 1856, must be determined by the provisions of the Code of 1853.—*Welsh v. Pounders*... 668
4. *What constitutes implied revocation of will*—Under the Code, (§ 1602,) a sale and conveyance of land by the testator, after the execution of his will, does not operate as a revocation of a devise of the land, when the purchase-money is unpaid at the time of his death, “unless it appears by the contract, or some other instrument in writing, to be intended as a revocation.” 668

WITNESS.

1. *Competency of defendant in execution as witness for plaintiff*. Under the Code, (§ 2302,) the defendant in execution is a competent witness for the plaintiff, on a trial of the right of property.—*Durden v. McWilliams*..... 345
2. *Competency of vendor as witness for purchaser*.—In an action of trespass against a sheriff, for seizing and selling plaintiff's property under execution against his vendor, a judgment for or against the plaintiff would not be admissible evidence for or against his vendor, in another action; consequently, under section 2302 of the Code, his vendor is a competent witness for the plaintiff.—*Sawyer v. Ware*..... 675
3. *Competency of transferor as witness for transferee*.—Neither section 2290 of the Code, (which declares the transferor of any contract not a competent witness for his transferee, “to prove the cause of action,”) nor the analogous rule settled by several decisions of this court prior to the Code, applies to a case in which the vendor of a manufactured article is offered as a witness for the purchaser, in an action of trespass by the latter, against the sheriff, for seizing and selling the article under execution against the vendor..... 675
4. *Competency of stockholder as witness for private corporation*.—A stockholder in a railroad company is not a competent witness for the corporation.—*Ala. & Miss. Rivers Railroad Company v. Sanford & Reid*..... 703
5. *Cross-examination of witness*.—If a witness betrays bias, partiality, or corruption, the appellate court will lay down no rule as to the questions which may be asked him on cross-examination: “that must be, in a great degree, left to the discretion of the presiding judge.”—*In re Carmichael*..... 514
- See, also, EVIDENCE, 41–45.

WRIT.

1. *Ca. sa.*—A writ of *ca. sa.* is not confined in its operation to the county of the defendant's residence; nor is it necessary that the clerk endorse on it that the sheriff hold the defendant to bail in double the sum sworn to be due.—*Ex parte Cleveland*..... 306

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